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THE DEBTOR IN FULL CONTROL: A CASE FOR ADOPTION OF THE TRUSTEE SYSTEM

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I. INTRODUCTION

Controversy surrounding bankruptcy legislation is not a new phenomenon. Since Congress first discussed national bankruptcy legislation which would benefit debtors, "furious debates"[1] have taken place. Opposition to legislation introduced in 1840 argued that such a law creates "a general jubilee for debtors, . . . a novel, untried experiment, . . . [which] holds out a temptation to every debtor to push his speculations to the brink of rashness and recklessness, by affording him a sure refuge in case of wreck, at the sole hazard of the creditor."[2] The bill passed ten years after its introduction and was characterized as " 'one of the most flagrant laws ever

* Associate, Cook & Franke, S.C., Milwaukee, Wisconsin; J.D., University of Wisconsin, 1984; B.A., Lawrence University, 1979. The author wishes to express his appreciation to the bankruptcy judges and attorneys of the Eastern District of Wisconsin for the information and ideas contributed, to the bankruptcy clerks for their assistance, and to Professors Lynn M. LoPucki and William Whitford of the University of Wisconsin who reviewed the early drafts of this article.

Carl E. Horn, Statistical Consulting, Computing Services Division, University of Wisconsin-Milwaukee, selected and performed the statistical tests used in this study. These tests were completed using Release 9.0 of the Statistical Package for the Social Sciences (SPSS) and assessed through the University of Wisconsin-Milwaukee Computing Services Division. Documentation and additional references concerning tests are available from SPSS, Inc., 444 North Michigan Ave., Suite 3000, Chicago, Illinois, 60611.

1. WARREN, BANKRUPTCY IN UNITED STATES HISTORY 60-61 (1935).

2. *Id.*

passed [by] a Congress.' "[3] The 1978 reform of the bankruptcy laws was similarly attacked with charges that it was a complete failure.[4]

Recently, various studies[5] have gathered empirical data to determine the validity of this criticism. This article is a study which continues to build on the earlier studies. It examines the effect of Chapter 11 of the 1978 Bankruptcy Code[6] during the third year[7] after its enactment in the Eastern District of Wisconsin. It expands on a study entitled "The Debtor in Full Control — Systems Failure Under Chapter 11 of the Bankruptcy Code?"[8] conducted in the Western District of Missouri during the first year in which the Code was effective[9] (Kansas City study). Both the Kansas City study and this study (Milwaukee study) compiled empirical data taken from court files and interviews.

This study also utilizes the findings of two other studies to analyze the data found in Kansas City and Milwaukee. The Stanley & Girth study,[10] published in 1971, examined cases closed in the fiscal year 1964. It provided a comprehensive review of bankruptcy under the Act[11] and suggested major revisions[12] which were, in part, incorporated into the new Code.[13] The second study, the U.S. trustee study,[14] evaluated

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3. *Id.* at 80 (quoting CONG. GLOBE, 26th Cong. 2d Sess. 144 (1841) (statement of President Calhoun)).

4. P. NELSON, CORPORATIONS IN CRISIS: BEHAVIORAL OBSERVATIONS FOR BANKRUPTCY POLICY (1981); Eisenberg, *Bankruptcy Law in Perspective*, 28 UCLA L. REV. 953 (1981); Moller, *Chapter 11 of the 1978 Bankruptcy Code or Whatever Happened to Good-Old Chapter XI?*, 11 ST. MARY'S L.J. 437, 447 (1979).

5. *See infra* notes 8, 10 & 14.

6. The 1978 Bankruptcy Code is the common name for the bill, designated Pub. L. No. 95-598, signed by President Carter on November 6, 1978. Chapter 11 refers to debtor reorganization found in 11 U.S.C. §§ 1100 - 1174 (1982) [hereinafter Code].

7. January 1, 1982, until December 31, 1982.

8. LoPucki, *The Debtor in Full Control — Systems Failure Under Chapter 11 of the Bankruptcy Code?* (pts. 1 & 2), 57 AM. BANKR. L.J. 99 (1983), 57 AM. BANKR. L.J. 247 (1983).

9. October 1, 1979, until October 1, 1980.

10. D. STANLEY & M. GIRTH, BANKRUPTCY: PROBLEM, PROCESS, REFORM 109 (1971).

11. The "Act" generally refers to the Bankruptcy Act of 1898 and its subsequent amendments up until the enactment of the Code in 1978.

12. *See* D. STANLEY & M. GIRTH, *supra* note 10, at 197-218.

13. REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, PART 1, H.R. DOC. NO. 137, 93d Cong., 1st Sess. 8 (1973) [hereinafter COMMISSION REPORT].

a four-and-one-half year experiment in which U.S. trustees[15] were appointed to selected districts.[16] It sampled cases from the districts which had U.S. trustees (pilot districts) and districts without U.S. trustees (non-pilot districts) for the year ending June 30, 1981.[17] From the data of all the studies, this study examines the ability of the 1978 changes in the bankruptcy laws to meet objectives underlying bankruptcy reorganization.

Congress envisioned the objectives of Chapter 11 reorganization to allow a debtor, usually a business,[18] "to restructure a business' finances so that it may continue to operate, provide its employees with jobs, pay its creditors, and produce a return for its stockholders."[19] The premise underlying Chapter 11 reorganization is that the assets of a business are more valuable if they are used in the industry for which they are designed rather than liquidated.[20] Creditors, employees and equity holders all benefit by allowing the business to operate and reorganize.[21] The end result sought in a reorganization is a confirmed plan and a profitable business.[22]

Not all businesses, however, can be reorganized.[23] Those businesses unable to reorganize will eventually be liquidated for the benefit of creditors.[24] In non-pilot districts the Code

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14. N. AMES, L. STELLWAGON & R. JONES, AN EVALUATION OF THE U.S. TRUSTEE PILOT PROGRAM FOR BANKRUPTCY ADMINISTRATION (1983).

15. The U.S. trustee was a new administrative mechanism to perform the administrative functions performed under the Act by the bankruptcy judge. *See id.* at 21-25; *see also* 11 U.S.C. §§ 1501-151163 (1982).

16. Those districts included Northern Alabama, Central California, Colorado, Delaware, District of Columbia, Northern Illinois, Kansas, Maine, Massachusetts, Minnesota, New Hampshire, New Jersey, Southern New York, North Dakota, Rhode Island, South Dakota and Eastern Virginia. 28 U.S.C. § 581(a)(1982).

17. *Id.*

18. Of the 18,821 Chapter 11 bankruptcies filed in 1982, 16,622 were business Chapter 11 bankruptcies. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, FEDERAL JUDICIAL WORKLOAD STATISTICS, A-62, A-64, A-66 (for the 12-month period ending December 31, 1982) [hereinafter WORKLOAD STATISTICS].

19. H.R. REP. No. 595, 95th Cong., 1st Sess. 220 (1977).

20. *Id.*

21. *Id.*

22. *Id.* at 221.

23. The findings in both Kansas City and Milwaukee point out that only about 24% to 26% of the businesses will actually be reorganized and succeed. *See infra* notes 53 & 54.

24. See 11 U.S.C. § 1112(b) (1982), which provides that whether a case should be converted depends, in part, upon whether it "is in the best interests of creditors." *See*

theoretically places the burden of identifying such businesses on the creditors and the debtor.[25] Creditors in non-pilot districts are also primarily responsible for monitoring the day-to-day operations of the debtor.[26] In pilot districts this responsibility lies jointly with creditors and the U.S. trustee.[27]

This theoretical delegation of responsibility to creditors in the non-pilot districts represents a significant departure from the pre-Code bankruptcy law in which bankruptcy judges were actively involved in administering cases.[28] Under the Code, bankruptcy judges supposedly only become involved if a justiciable dispute arises. In order to meet the enlarged creditor responsibility, the Code provides creditors with various tools to protect their interests, to prevent debtors from abusing the bankruptcy process, and to insure that debtors timely reorganize their businesses.[29]

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also S. REP. No. 989, 95th Cong., 2d Sess. 117 (1978); H. R. REP. No. 595, 95th Cong., 1st Sess. 405 (1977).

25. 11 U.S.C. § 1112 (1982), provides that "[t]he debtor may convert a case under this chapter to a case under chapter 7," and that the court may convert the case "on request of a party in interest, and after notice and a hearing." The court does not have the power to convert on its own motion. J. TROST, G. TREISTER, L. FORMAN, K. KLEE & R. LEVIN, RESOURCE MATERIALS: THE NEW FEDERAL BANKRUPTCY CODE 265 (1979). However, there is authority to the contrary, and the bankruptcy courts are split on whether the Code permits the court to monitor and administrate reorganization cases. *See* LoPucki, *supra* note 8, at 249 n.83.

26. N. AMES, L. STELLWAGON & R. JONES, *supra* note 14, at 63.

27. 28 U.S.C. § 586(a)(3) (1982), provides: "(a) Each United States trustee, within his district, shall . . . supervise the administration of cases and trustees in cases under chapter 7, 11, or 13 of title 11. . . ."

28. "The court is removed from any obligation to oversee or otherwise be concerned about the operation of that business. That is the function of the creditors' committee, the United States trustee and the creditors themselves." Moller, *supra* note 4, at 447; *see also* COMMISSION REPORT, *supra* note 13, at 93-94; J. TROST, G. TRIESTER, L. FORMAN, K. KLEE & R. LEVIN, *supra* note 25, at 7-11; Kennedy, *The Bankruptcy Court Under the New Bankruptcy Law: Its Structure and Jurisdiction*, 55 AM. BANKR. L.J. 63, 63-65 (1981).

29. See 11 U.S.C. § 1112(b) (1982) which allows a creditor to move to convert a case under Chapter 11 to Chapter 7 if there is an absence of a reasonable likelihood of rehabilitation, the debtor is unable to effectuate a plan, or if there is an unreasonable delay that is prejudicial to creditors. The court must convert the case if it is in the best interest of the creditors and the estate. Section 1104 allows a creditor to move for the appointment of a trustee or an examiner; Section 1103 allows the creditors' committee to hire attorneys, accountants or other agents to perform services for it; Section 1121(c) allows creditors to file a plan of reorganization after the exclusive period for the debtor elapses.

The Kansas City study found that a lack of creditor participation in Chapter 11 proceedings had caused a systems failure in the Western District of Missouri.[30] Debtors[31] operated their businesses as long as current expenses could be met. Creditors could not force the debtors to end their businesses. The Kansas City study concluded the debtors were in full control of the reorganization proceedings. This study tests that conclusion by comparing the data from Milwaukee with the findings of the Kansas City study and other studies.

In gathering the data, every attempt was made to duplicate the methodology and classifications used in Kansas City. Data was collected by going through court files in January and February of 1984. Unlike the Kansas City study, not every case filed was studied. There were 152 cases filed under Chapter 11 during the 1982 calendar year in the Eastern District of Wisconsin;[32] forty-eight cases[33] were examined. This represents 37% of the cases filed in the Eastern District of Wisconsin and 0.3% of Chapter 11 cases filed in all the districts for 1982.[34] The first four cases filed in each month were used in order to avoid seasonal bias. Attorneys, judges, and estate administrators were interviewed where supplemental information was necessary. A follow-up examination of each file was conducted in March, 1985.

The findings in the Eastern District of Wisconsin may be representative of many districts. At the time of this study, the district included the City of Milwaukee, which ranks eighteenth and Milwaukee's metropolitan area, which ranks twenty-seventh in population in the United States.[35] The city had the tenth largest volume of industrial production with the

30. LoPucki, *supra* note 8, at 103.

31. Throughout this study "debtor" is used to mean both a debtor-in-possession and the business itself.

32. WORKLOAD STATISTICS, *supra* note 18, at A-63, A-65.

33. Fifty-seven cases were actually examined. Like the Kansas City study, cases which were jointly administered or were substantively related were treated as one. Also, involuntary petitions were usually followed by a subsequent voluntary petition. These cases were treated as one case. *See* LoPucki, *supra* note 8, at 101-02 n.7.

34. Fifty-seven filings in Wisconsin were examined. The total number of Chapter 11 filings in the country was 18,821. *See* WORKLOAD STATISTICS, *supra* note 18, at A-62, A-64.

35. Newspaper Enterprise Association, Inc., THE WORLD ALMANAC & BOOK OF FACTS 1982, at 664 (1982).

fourth largest auto making center in the United States.[36] In contrast with the Milwaukee Metropolitan Area, the district also included farming counties and smaller communities and cities.

Table 1 shows the types of businesses which filed under Chapter 11 in the various districts studied in the Milwaukee, Kansas City, Stanley & Girth and U.S. trustee studies. The apportionment among the types of businesses filing in the various districts appears to be similar.[37]

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36. *Id.*

37. The types of businesses filing in Milwaukee and Kansas City were similar to a statistically significant degree. In comparing the types of businesses in Kansas City and Milwaukee, the following null hypothesis was accepted at a level of significance equal to 0.2838 using the chi-squared test of homogeneity:

H: The distribution between Milwaukee and Kansas City is the same.

A: There is a difference in the distribution between Milwaukee and Kansas City.

There was found to be a statistically significant variance in the types of businesses between all of the studies. A statistical test was performed to determine whether a difference existed in proportion to the various types of businesses in Milwaukee, Kansas City, the pilot and non-pilot districts. The following null hypothesis was rejected in favor of the alternative hypothesis that there was a difference at a level of significance of 0.0127 using the chi-squared test of homogeneity:

H: The distribution is the same for all districts.

A: The distribution varies between the districts.

The distribution in the Stanley & Girth study was excluded because actual numbers for the percentages could not be determined.

TABLE 1
TYPES OF BUSINESSES

Description	XI[38]	K.C.[39]	Milw.[40]	Pilot[41]	Non-Pilot
Manufacturing	40%	30%	22%	20%	11%
Services	20%	8%	20%	27%	29%
Retail Trade	19%	24%*	18%	20%	22%
Wholesale Trade	10%	6%*	4%	0%	0%
Agriculture	5%	6%	8%	4%	4%
Construction	2%	6%	10%*	7%	9%
Real Estate	2%	4%	10%*	11%	11%
Transportation	1%	8%	0%	5%	6%
Finance	1%	0%	0%	3%	5%
Warehousing	0%	2%	0%	0%	0%
Unclassified	0%	4%	6%	3%	3%
	100%	98%**	98%**	100%	100%

* One business in each study was classified under two categories and was therefore counted twice.

** Percentages were rounded off and therefore do not add up to 100%.

This article analyzes the findings of the Milwaukee study in three parts. The first part compares the findings in Milwaukee with those relied upon by the Kansas City study to determine whether the debtor was in full control. The second part investigates the reasons for debtor control by examining six mechanisms provided in the Code to control debtors. The third part suggests that the solution to the problem of debtor control is the adoption of the U.S. trustee system.

II. DEBTOR CONTROL

The Kansas City study concluded that "the debtors studied were able to continue in complete control of their businesses while they were under the jurisdiction of the court. With the . . . exception of secured and priority creditors' ability to negotiate their own treatment under a plan, creditors

38. D. STANLEY & M. GIRTH, *supra* note 10, at 109.
39. LoPucki, *supra* note 8, at 118-19, 122-23.
40. *See infra* APPENDIX, Charts I & III.
41. N. AMES, L. STELLWAGON & R. JONES, *supra* note 14, at 48.

were effectively excluded from the process of reorganization."[42]

That study relied upon three findings to support its conclusion. First, creditors could not close nonviable businesses as long as the debtor could pay current operating expenses.[43] Second, creditors could not force a change in management even though poor management was widely believed to be the cause of most businesses' failures.[44] Third, unsecured creditors lacked the power to meaningfully negotiate their own treatment under the plans.[45] One additional finding supporting the conclusion is the debtors' ability to use the Chapter 11 proceedings to delay payments to creditors.

This section will compare the findings in Milwaukee in these four areas with those in Kansas City to determine the extent to which the conclusion from the Kansas City study is applicable to Milwaukee.

A. Creditor Inability to Promptly Close Nonviable Businesses

Creditors in an open credit economy often have an interest in promptly closing nonviable[46] businesses. Creditors have sometimes been required to wait for eighteen months or more[47] before the debtor files under Chapter 11. If acting in their own best interests, creditors should want to receive prompt payment to minimize the time-loss value[48] of their

42. LoPucki, *supra* note 8, at 272.

43. *Id.*

44. *Id.* at 264-65, 272.

45. *Id.* at 272.

46. A business is nonviable when its immediate liquidation value exceeds the present value of the future excess of revenue over expenses other than interest on debt already incurred and depreciation on assets already owned. LoPucki, *A General Theory of the Dynamics of the State Remedies/Bankruptcy System*, 1982 WIS. L. REV. 311, 325-27 (1982); *see also* Bulow & Shoven, *The Bankruptcy Decision*, 9 BELL J. ECON. 437, 442 (1978). Thus, profitability alone does not determine whether a business is viable. Viability depends on the present value of the continuation of the business being greater than the immediate liquidation value.

47. LoPucki, *supra* note 8, at 261-62.

48. The loss in the time value of money refers to the difference between the value of a claim if it is paid immediately and the value of that same claim if it is received at a later date. Even without inflation, the use of money has value. *See* W. KLEIN, BUSINESS ORGANIZATION AND FINANCE 201 (1980).

money, to insure that assets are not dissipated,[49] and to receive the maximum liquidation value of the business. Creditors willingly wait longer to receive payment rather than seek immediate liquidation of the business because of the possibility that continued operation of the business will yield greater payment. If a business cannot be reorganized and is nonviable, the creditors should demand the prompt liquidation of the business[50] in order to minimize their losses.

Sometimes unsecured creditors have no interest in liquidating a business regardless of its viability. If, as is often the case, liquidation of the business would yield nothing for unsecured creditors, their only hope of payment is the continued operation of the business. Also, trade creditors may continue to supply the debtor on a C.O.D. basis after the Chapter 11 filing and may not press for liquidation.

Congress recognized creditor interest in liquidating some businesses by providing that any party in interest, including a creditor,[51] may request the court to convert the case to a Chapter 7 if the debtor is unable to effectuate a plan, if there is a continuing loss or diminution of the estate and unreasonable likelihood of rehabilitation, or if there is unreasonable delay prejudicial to creditors.[52] Given the findings in Kansas City and Milwaukee that 74%[53] and 76%,[54] respectively, of the operating businesses entering Chapter 11 proceedings were destined to fail, it would seem likely that creditors might benefit from identifying many nonviable businesses and forcing their prompt liquidation.

The Kansas City study found, however, that of the twenty-four cases closed while under the jurisdiction of the

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49. If an unprofitable business continues to operate while under the protection of the bankruptcy court, assets which may have been available for unsecured creditors at the time of filing could be dissipated through paying salaries to officers and key personnel, liquidating assets (often to insiders), and employing professionals with high fees (as a cost of administration). N. AMES, L. STELLWAGON & R. JONES, *supra* note 14, at 71.

50. Liquidation of the business can occur through the sale of the business as a going concern to a third-party.

51. A party in interest includes a creditor. 11 U.S.C. § 1109(b) (1982).

52. 11 U.S.C. § 1112(b) (1982).

53. LoPucki, *supra* note 8, at 100. The Kansas Citystudy found a 26% overall success rate.

54. *See infra* APPENDIX, Chart II. Of the 48 businesses which filed under Chapter 11, about which the outcome is known, 11 were successfully reorganized.

court, only one (4%) was closed against the wishes of the debtor.[55] The debtors in Kansas City moved to convert or dismiss, or proposed a liquidating plan, in eighteen cases. In the five other cases the court entered the order to convert or dismiss without objection by the debtors.[56]

Of the twenty-seven businesses closed in Milwaukee while under the jurisdiction of the court,[57] debtors did not consent to closing the businesses in four cases (15%).[58] Fifteen businesses were closed after the debtors moved to convert or dismiss, or after the debtors proposed a liquidating plan.[59] Eight

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55. LoPucki, *supra* note 8, at 260-61.

56. *Id.* at 261.

57. *See infra* APPENDIX, Chart II.

58. *Id.* A.W. Huss Co., No. 82-00097 (E.D. Wis. filed Jan. 18, 1982); Conservation Update Publications, Inc., No. 82-03509 (E.D. Wis. filed Oct. 5, 1982); K. & S. Oriental Food Store, Inc., No. 82-02610 (E.D. Wis. filed Aug. 3, 1982); Norwood Servs., Inc., No. 82-02673 (E.D. Wis. filed Aug. 6, 1982).

In *A. W. Huss*, the creditors successfully ousted the debtor when the court appointed a trustee over the objection of the debtor. The trustee later liquidated the business without any opposition from the debtor.

A secured creditor in *K. & S. Oriental* successfully lifted the stay when the debtor failed to object. The stay was lifted by operation of law. Later, the court refused the debtor's motion to use its equitable power under § 105 to continue the stay. The debtor appealed, and the appeal was eventually dismissed for lack of prosecution.

In *Conservation Update*, the debtor successfully opposed a motion to convert one month before the case was converted even though its attorney had withdrawn from the case one month earlier. It is unclear whether the debtor opposed the successful motion to convert. The Chapter 7 trustee then took over and operated the business. The trustee investigated the debtor's personal dealings with the business. Later, the debtor's motion to dismiss the case was denied.

The debtor in *Norwood* filed a plan three months after filing. The only creditors involved were taxing authorities. The plan proposed to pay them without interest. Such a plan cannot be confirmed under 11 U.S.C. § 1129(a)(9)(C) (1982), which provides that taxes must be paid either in full or with interest. No confirmable plan was ever filed and the court, over the objection of the debtor, dismissed the case.

59. Bernard Cos. Ins. Agency, No. 82-03913 (E.D. Wis. filed Nov. 4, 1982); Carpet Faire, Inc., No. 82-00336 (E.D. Wis. filed Feb. 11, 1982); Clausing, R. & J., No. 82-01516 (E.D. Wis. filed May 11, 1982); Doelger & Kirston, Inc., No. 82-01836 (E.D. Wis. filed June 4, 1982); Dor-Phil, Inc., 82-00283 (E.D. Wis. filed Feb. 8, 1982); Goelzer & Schultz Co., No. 82-01162 (E.D. Wis. filed Apr. 19, 1982); Janicki's Men's Wear, Ltd., No. 82-00630 (E.D. Wis. filed Mar. 5, 1982); K.J. & P.J. Invs. Inc., No. 82-03058 (E.D. Wis. filed Sept. 9, 1982); Kool Bros. Inc., No. 82-04443 (E.D. Wis. filed Dec. 13, 1982); Leister, P., No. 82-03875 (E.D. Wis. filed Nov. 2, 1982); National Control Sys., Inc., No. 82-03455 (E.D. Wis. filed Oct. 1, 1982); New Frontier Mfg., Inc., No. 82-01542 (E.D. Wis. filed May 12, 1982); Rennhack, P. & S., No. 82-01168 (E.D. Wis. filed Apr. 19, 1982); Rhode, R., No. 82-03012 (E.D. Wis. filed Sept. 3, 1982); Schoeffler Diamonds, Inc., No. 82-03128 (E.D. Wis. filed Sept. 13, 1982).

others were closed after the court or creditors moved to convert or dismiss the case without opposition from the debtor.[60]

Creditors in Milwaukee were able to close three more nonviable businesses than their Kansas City counterparts. While this may suggest that Milwaukee creditors had more control than the Kansas City creditors, there was no statistically significant difference in the amount of control.[61] An examination of unsecured creditors' efforts in Milwaukee supports the finding in Kansas City of unsecured creditors' general inability to close nonviable businesses.

Creditors in Milwaukee were initially unsuccessful in attempts to close most of the businesses they identified as nonviable. Creditors had unsuccessfully moved to dismiss or convert seven businesses destined to fail.[62] Those businesses continued operating for up to twenty-one months before paying anything to creditors,[63] or up to seven months before being converted or dismissed with the debtors' consent.[64] Of the twenty-seven cases in Milwaukee closed while under the juris-

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60. Foremost Metal Prods., Inc., No. 82-01860 (E.D. Wis. filed June 7, 1982); Horizons Int'l, Inc., No. 82-01482 (E.D. Wis. filed May 7, 1982); Koceja, W. & P., No. 82-00640 (E.D. Wis. filed March 5, 1982); Mattias & Son, Inc., No. 82-03907 (E.D. Wis. filed Nov. 3, 1982); Metal Parts Corp., No. 82-04439 (E.D. Wis. filed Dec. 13, 1982); Realty Plus, 82-01794 (E.D. Wis. filed June 1, 1982); Stanley J. Matson & Son, Inc., No. 82-00098 (E.D. Wis. filed Jan. 18, 1982).

61. Rather, the ability of both Milwaukee and Kansas City creditors to close nonviable businesses was found to be the same to a statistically significant degree. Using the Fisher-Irwin test and Fisher's Exact test, the following null hypothesis was accepted and the alternative hypothesis rejected:

H: Milwaukee creditors have the same or less ability to close nonviable businesses as Kansas City creditors.

A: Milwaukee creditors have more ability than Kansas City creditors to close nonviable businesses.

The null hypothesis was accepted in both tests with an approximate significance level of 0.2100.

62. *A.W. Huss*, No. 82-00097; *Foremost*, No. 82-01860; *Koceja*, No. 82-00640; Realty Constr., Inc., No. 82-00260 (E.D. Wis. filed Feb. 4, 1982); *Stanley J. Matson & Son*, No. 82-00098.

63. In Norwood Servs., Inc., No. 82-02673 (E.D. Wis. filed Aug. 6, 1982), one unconfirmable plan was proposed three months after filing. The business was finally dismissed over the debtor's objection 21 months later. *See infra* APPENDIX, Chart III.

64. *See infra* APPENDIX, Chart III. Realty Construction, Inc. was not operating at the time the motion to convert was filed. *Realty Constr.*, No. 82-00260. A motion to convert was filed in *Metal Parts*, No. 82-04439, in June, 1983. Metal Parts Corp. was converted in January 1984. *See infra* APPENDIX, Chart III.

diction of the court, creditors' initial attempts to close eleven[65] businesses (41%) by moving to convert, dismiss or lift the stay resulted in seven failures (64%), three successes with the consent of the debtors (27%), and one success without the debtor's consent (9%).[66]

Like the cases studied in Kansas City, most of the businesses were closed only after debtors could not meet operating expenses. Only then did the debtors in Milwaukee move to convert or dismiss the cases, or fail to oppose creditors' motions to convert. Debtors voluntarily closed eleven businesses[67] (41%) after they could notmeet their ordinary operating expenses. Debtors voluntarily closed eight other businesses[68] when they were unable to pay taxes, payments under a confirmed plan, or adequate protection payments[69] to secured creditors ordered by the court in a "doomsday" order.[70] The debtors' inability to pay these normal operating ex-

65. *A.W. Huss*, No. 82-00097; Conservation Update Publications, Inc., No. 82-03509 (E.D. Wis. filed Oct. 5, 1982); *Foremost*, No. 82-01860; Horizons Int'l, Inc., No. 82-01482 (E.D. Wis. filed May 7, 1982); *Koceja*, No. 82-00640; Mattias & Son, Inc., No. 82-03907 (E.D. Wis. filed Nov. 3, 1982); *Metal Parts*, No. 82-04439; *Norwood*, No. 82-02673; *Realty Constr.*, No. 82-00260; Realty Plus, No. 82-01794 (E.D. Wis. filed June 1, 1982); *Stanley J. Matson & Son*, No. 82-00098.

66. The seven failures were *A.W. Huss*, No. 82-00097; *Conservation Update*, No. 82-03509; *Foremost* No. 82-01860; *Horizons Int'l*, No. 82-01482; *Koceja*, No. 82-00640; *Metal Parts*, No. 82-00439; and *Realty Constr.* No. 82-00260. Of the seven initial failures three were within three months of the filing date. The other four failures were between four and eleven months after filing. The three successful motions with the debtor's consent were *Mattias & Son*, No. 82-03907; *Realty Plus*, No. 82-01794; *Stanley J. Matson & Son*, No. 82-00098. The one success without the debtor's consent was *Norwood*, No. 82-02673.

67. Carpet Faire, Inc., No. 82-00336 (E.D. Wis. filed Feb. 11, 1982); Clausing, R. & J., No. 82-01516 (E.D. Wis. filed May 11, 1982); Goelzer & Schultz Co., No. 82-01162 (E.D. Wis. filed Apr. 19, 1982); Janicki's Men's Wear, Ltd., No. 82-00630 (E.D. Wis. filed Mar. 5, 1982); K.J. & P.J. Invs., Inc., No. 82-03058 (E.D. Wis. filed Sept. 9, 1982); Kool Bros., Inc., No. 82-04443 (E.D. Wis. filed Dec. 13, 1982); Leister, P., No. 82-03875 (E.D. Wis. filed Nov. 2, 1982); National Control Sys., Inc., No. 82-03455 (E.D. Wis. filed Oct. 1, 1982); New Frontier Mfg., Inc., No. 82-01542 (E.D. Wis. filed May 12,1982); Rennhack, P. & S., No. 82-01168 (E.D. Wis. filed Apr. 19, 1982); Rhode, R., No. 82-03012 (E.D. Wis. filed Sept. 3, 1982).

68. *Foremost*, No. 82-01860; *Horizons Int'l*, No. 82-01482; *Koceja*, No. 82-00640; *Mattias & Son*, No. 82-03907; *Metal Parts*, No. 82-04439; *Realty Constr.*, No. 82-00260; *Realty Plus*, No. 82-01794; *Stanley J. Matson & Son*, No. 82-00098.

69. *See* 11 U.S.C. § 361(1) (1982).

70. As a compromise to motions to lift the stay or convert, the court ordered payments to secured creditors or tax authorities in the form of a "doomsday" order. A "doomsday" order provides that if payments are not regularly made, upon the request

penses[71] led the court to enter unopposed orders to convert, or prompted the debtors to convert on their own. Thus, in nineteen of the twenty-seven cases (70%), the debtor voluntarily closed the business only after the business could not meet normal operating expenses.

Like the creditors in Kansas City, the creditors studied in Milwaukee were unable to promptly close businesses identified as nonviable. Milwaukee creditors were more successful than Kansas City creditors in closing nonviable businesses, but 70% of the nonviable businesses in Milwaukee continued to operate as long as debtors could pay current operating expenses. The debtors' ability to meet current operating expenses, rather than the creditors' ability to attack nonviable businesses, determined when those businesses would be closed in both Milwaukee and Kansas City.

B. Creditor Ability to Change Management

"There is a broad consensus among students of business failure that the large majority of businesses which fail do so because of poor management."[72] The Kansas City study concluded from this premise that changes in management would often be needed to enable a successful reorganization but, in fact, found that management was rarely ousted.[73]

Creditors in Milwaukee were only slightly more successful. They ousted management in one case,[74] and the debtors agreed to relinquish control of the businesses with the appointment of a trustee in three other cases.[75] Creditors in Milwaukee moved to appoint a trustee in two other cases but were unsuccessful.[76]

The creditors' committee in *A. W. Huss Co.*,[77] moved to appoint a trustee after receiving the examiner's report. The

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of the creditor, the court at the time of the default will then grant the relief: either the lifting of the stay or conversion.

71. Normal operating expenses include adequate protection payments. *See infra* notes 154-55.

72. LoPucki, *supra* note 8, at 263.

73. *Id.* at 264.

74. A.W. Huss Co., No. 82-00097 (E.D. Wis. filed Jan. 18, 1982).

75. *See supra* note 58.

76. Those cases were Bernard Cos. Ins. Agency, No. 82-03913 (E.D. Wis. filed Nov. 4, 1982); Realty Constr., Inc., No. 82-00260 (E.D. Wis. filed Feb. 4, 1982).

77. No. 82-00097 (E.D. Wis. filed Jan. 18, 1982).

report revealed that the present owners, husband and wife, bought the wholesale food business from the wife's father two and one-half years before filing under Chapter 11. Expenses in nine categories rose from $894,197 in 1979, to $2,218,727 in 1981, when the new owners modernized and moved the business to a new industrial park.[78] Shortly after filing, salesmen, delivery drivers and one office manager quit without notice.[79] Sales dropped by fifty percent.[80] The corporation had purchased a home for the new owners and had paid their personal travel expenses.[81] The business had been profitable before the new owners took over. Over the objection of the owners, the court appointed a trustee.

Trustees were appointed in *Plunkett, O. & M.*,[82] *4X Corp.*[83] and *Pavek Bros. Farms*[84] after the current management consented to the appointment. *Plunkett* involved the failing of a real estate empire; the debtor was convicted of violating state security laws. In *Plunkett*, the debtor moved for the appointment of a trustee immediately after filing. Attorneys in the case stated that the debtor felt if he did not voluntarily move for a trustee, one would nonetheless be appointed. The debtor apparently recognized his own gross mismanagement.

In 4X Corp., the debtor consented to a trustee after heavy pressure by the creditors.[85] Three families owning companies

78. The following information was taken from the Examiner's Report:

	1979	1981
Leasehold Improvements	$ 553	$ 4,075
Plant Equipment	2,500	146,600
Wages	524,160	884,402
Warehouse Expenses	892	17,083
Utilities	904	46,167
Truck & Auto Investments	300,646	626,286
Truck Expenses	280,307	117,726
Office Equipment	20,880	148,016
Office Supplies	19,913	65,786
TOTAL	$894,197	$2,218,727

79. *Id.*

80. *Id.*

81. *Id.*

82. No. 82-01119 (E.D. Wis. filed Apr. 15, 1982).

83. No. 82-04419 (E.D. Wis. filed Dec. 10, 1982).

84. No. 82-02694 (E.D. Wis. filed Aug. 9, 1982).

85. From December 22, 1983, until February 12, 1984, three creditors moved to lift the stay; two creditors moved to convert to Chapter 7; one moved to limit the use of cash collateral, and one objected to any further extension of time for the debtor to have

involved in cement, asphalt and road construction merged to form the debtor corporation eleven months before the corporation filed under Chapter 11. The debtor blamed problems on inefficiency and duplication of administrative expenses and authority. The debtor continued to lose money during the Chapter 11 proceedings, and creditors heavily attacked the continued operation of the business immediately before the trustee was appointed.[86] The debtor reached a compromise with the creditors by consenting to the appointment of a trustee, and the debtor's operations markedly improved afterward.[87]

The creditors' committee moved for the appointment of a trustee in *Pavek Bros. Farms* for the limited purpose of finding a lessee for the farmland. The debtor consented to the appointment for this purpose. The trustee did not operate the farm or investigate the operations of the debtor, but merely insured that rental payments from the land went to the estate.

Two of these three cases were the largest unsuccessful cases studied.[88] As such, it appears that in large asset cases involving mismanagement, creditors can successfully oust current management either forcibly or coercively.

In light of the widely accepted notion that poor management is the principal reason for business failures and that unsecured creditors many times will not be paid if the business

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the exclusive right to file a plan of reorganization. The trustee was appointed in March, 1984.

86. A review of the annual audit filed in 1985 revealed the following:

	1983	1984	1985 (Est.)
Net Sales (x 1,000)	$22,251	$22,219	$22,291
Cost of Sales (x 1,000)	22,379	20,686	20,549
Gross Profit (x 1,000)	872	1,533	1,742
Administrative Expenses (x 1,000)	1,378	1,380	1,380
Operating Profit (x 1,000)	(506)	153	362
Difference between Misc. Income and Misc. Expenses (x 1,000)	(2,026)	(749)	249
Net Earnings (x 1,000)	(2,532)	(596)	611

87. A plan of reorganization was eventually confirmed on July 22, 1985. (This has not been included in Charts II, III or V of the APPENDIX as a "success" case because it occurred after the statistical tests were run and the paper was virtually completed. Since the case was pending at the time the statistical tests were conducted, it was excluded from the data involving "success" cases.).

88. *See infra* APPENDIX, Chart II.

does not succeed,[89] it seems unlikely that only three of the largest debtors were poorly managed businesses requiring complete replacement of management. Rather, creditors were generally unable or unwilling to remove poor management in other cases even where a strong likelihood existed that failure of the business meant no payment.

The creditors probably did not remove management due to the amount of assets, the number of employees and the lack of knowledge about the business. These factors made the appointment of a trustee impossible. In some cases, businesses were so small that sufficient income could not be generated to support the expense of a trustee. The cost to creditors of imposing a trustee might have influenced the decision. Although the creditors' committee has the right to have its attorney fees paid by the debtor,[90] the debtor, against whom the right is enforced, may not have the money to pay these expenses.

The size of the business influenced the decision to appoint a trustee since many times small businesses could not have operated without the principal owners. Of the thirty-six[91] businesses studied, twenty-six had either one or two owners (72%).[92] The remaining businesses were also closely held.[93] If a business had relatively few assets and was closely held, the principal owner was usually the manager and principal employee. Frequently, the owner was the only one who knew the important information about the business and was not fully compensated for his time. For example, in *Bernard Cos. Insurance Agency, Inc.*,[94] the creditors' committee opposed the debtor's motion to convert and asked that a trustee be ap-

89. *See infra* text accompanying note 136.

90. The creditors' committee, with court approval, can employ an attorney at the expense of the debtor. 11 U.S.C. § 1103(a) (1982). *See* Blaine & Erne, *Creditors' Committees Under Chapter 11 of the United States Bankruptcy Code: Creation, Composition, Powers and Duties*, 67 MARQ. L. REV. 491, 501-03 (1984); DeNatale, *The Creditors Committee Under the Bankruptcy Code — A Primer*, 55 AM. BANKR. L.J. 43, 58-62 (1981).

91. Of the 48 cases studied, the number of the principal owners is known in 36 cases.

92. *See infra* APPENDIX, Chart I.

93. The other businesses had between 3 and 32 owners. The largest ones, National Control Systems, Inc. and 4X Corp., with 32 and 23 owners, respectively, were family controlled with some family members owning relatively few shares. Only a handful of those shareholders ran or controlled the business.

94. No. 82-03913 (E.D. Wis. filed Nov. 4, 1982).

pointed. The court ruled that a trustee could not be appointed because the business, an insurance agency, depended upon the owner's personal contacts and could not operate without the involvement of the owner.

Creditors had no real opportunity to impose a change in management by appointing a trustee in cases involving small, closely held businesses. In those businesses, if the debtor were ousted, there would have been no management and the business would have immediately closed. The needed change of management never occurred either because the court or the creditors were unwilling to force a change. As such, the debtors remained in control of the businesses, with no threat of a loss of control in most cases.

C. Creditor Treatment Under Debtor Proposed Plans

The Kansas City study concluded that "the debtors studied were successful in dictating the terms of reorganization to their creditors."[95] Similarly, the findings in Milwaukee show the debtors dictated the terms of their plans to creditors.[96]

1. Liquidating Plans

Five of the twenty-two Milwaukee plans (22%) proposed to liquidate the assets and pay creditors according to the liquidation priority under the Code.[97] Of the five liquidating plans, only one attempted to sell the business as a going concern; however, this attempt failed and the assets were individually auctioned off. The other four plans proposed to sell off the assets in an orderly liquidation.

Apparently creditors do not object to debtors liquidating their own businesses. Creditors voted on and confirmed two liquidation plans.[98] Creditors mounted no opposition despite the proposal in both confirmed plans to pay potentially unsecured creditors less than they would have received under Chapter 7. For example, the debtor in *Schoeffler*

95. LoPucki, *supra* note 8, at 101.

96. *See infra* APPENDIX Chart V.

97. See 11 U.S.C. §§ 726, 507 (1982) in which priorities for distribution are set forth.

98. Dor-Phil, Inc., No. 82-00283 (E.D. Wis. filed Feb. 8, 1982); Schoeffler Diamonds, No. 82-03182 (E.D. Wis. filed Sept. 13, 1982).

Diamonds[99] proposed to pay unsecured creditors 60% of the net sales receipts after payment of priority and secured claims. Forty percent would be paid to the sole equity holder. Neither the creditors' committee nor the attorney for the committee objected. In *Dor-Phil, Inc.*,[100] the debtor proposed to sell the business as a going concern within sixty days of confirmation and, if such plan was successful, to pay the owner a $7,500 bonus. The plan provided that if the debtor could not sell the business as a going concern, the assets would be liquidated at an auction. The auction took place netting only $11,000, and the debtor waived any rights to the bonus. No creditors' committee was involved.

These two cases are unusual in that creditors voluntarily voted to take less than they might have received in a Chapter 7 liquidation. Under Chapter 7, equity holders would receive no payment unless all other creditors were paid in full.[101] Although creditors elected to receive less than they might have under Chapter 7, neither equity holder actually received payment.

2. Operating Plans

The operating plans examined in Milwaukee and Kansas City were remarkably similar. All the operating plans, except one, proposed to pay unsecured creditors over time and usually without interest. The plans ranged from paying 100% to 13.5% over a period of seventeen months to six years. The Kansas City study found that the operating plans polarized into two categories, those paying 100% to unsecured creditors, and those paying as little as possible.[102]

That study reasoned that debtors proposed to pay 100% either for business reputation or moral reasons, or where they feared losing ownership under the absolute priority rule of Section 1129(b).[103] If 100% could not be paid, business repu-

99. No. 82-03128 (E.D. Wis. filed Sept. 13, 1982).

100. No. 82-00283 (E.D. Wis. filed Feb. 8, 1982).

101. The debtors are listed last in the order of priorities to receive payment. 11 U.S.C. § 726 (1982).

102. LoPucki, *supra* note 8, at 267.

103. *Id.* at 261-68. 11 U.S.C. § 1129(b)(1982) provides that if all the classes of creditors do not accept the plan, the debtor may still receive confirmation, but only if the debtor does not retain any ownership interest.

tation and morality were no longer important so debtors proposed to pay as little as possible. This explained the low number of plans, three (10%), paying a middle range of 44% to 99% of the unsecured creditor claims.[104] That study predicted that once debtors' attorneys realized the low probability of the debtors' losing control of the business under the absolute priority rule of Section 1129(b), debtors would propose to pay less to unsecured creditors.[105]

The plans studied in Milwaukee were consistent[106] with that prediction. As indicated by Table 2 below, almost half[107] of the operating Milwaukee plans proposed to pay less than 43% to unsecured creditors.

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104. LoPucki, *supra* note 8, at 267.

105. *Id.* at 269.

106. The plans were consistent and the percentages paid under the plans were not different in Milwaukee to a statistically significant degree. Tests were run on each category of operating plans. Each test found no statistically significant difference between the categories. The null hypothesis for each was accepted:

1. H: The proportion of debtors who proposed to pay 100% in Milwaukee is the same as the proportion who planned to pay 100% in Kansas City.
   A: The proportions are not the same.

The hypothesis was accepted with a significant probability level of 0.1156 using the chi-squared test of homogeneity. The Pearson's correlation coefficient is 0.25.

2. H: The proportion of debtors who proposed to pay 75% to 100% is the same in Milwaukee and Kansas City.
   A: The proportion is smaller in Milwaukee than in Kansas City.

The Fisher-Irwin test, a small sample test, yields a significance level of 0.185.

When following the alternative hypothesis substitute, A, the proportion of debtors who proposed to pay 75% to 99% is not the same in Milwaukee and Kansas City. If tested using the chi-squared test of homogeneity, the significance level is 0.1518.

3. H: The proportion of debtors who planned to pay 44% to 74% is the same in Milwaukee and Kansas City.
   A: The proportion of debtors who planned to pay 44% to 74% is smaller in Kansas City than in Milwaukee.

When the Fisher-Irwin test is used the resulting significance probability is 0.6300.

When testing the substitute alternative hypothesis, A, the proportion of debtors who plan to pay 44% to 74% is not the same in Milwaukee and Kansas City, the chi-squared test has a significance level of 0.7665.

4. H: The proportion of debtors who planned to pay 10% to 43% is the same in Milwaukee and Kansas City.
   A: The proportions are not the same.

Thechi-squared test gives a significance level equal to 0.3748. Pearson's correlation coefficient is 0.139.

107. Liquidating plans are excluded from the calculations of operating plans.

TABLE 2
TYPES OF DEBTOR-PROPOSED PLANS

	Kansas City		Milwaukee	
Liquidating Plans	6	(20%)	5	(23%)
100%	13	(43%)	5	(22%)
75% to 99%	1	(3%)	3	(14%)
44% to 74%	2	(7%)	1	(5%)
10% to 43%	8	(26%)	8	(36%)
	30[108]	(99%)	22[109]	(100%)

Debtors in Milwaukee, like those in Kansas City,[110] who proposed to pay 43% or less of the unsecured claims, had no trouble receiving enough votes for confirmation of their plans and did not appear to risk the loss of their ownership. Of the eight plans proposing to pay 43% or less, the votes on four confirmed plans ranged from 88% to 100%.[111]

Three of the four unconfirmed plans failed not as the result of unsecured creditor opposition, but rather as the result of either the debtors' failure to propose a legally confirmable plan or opposition by secured creditors. In *Bernard Cos.*,[112] the debtor apparently filed the plan merely because it felt the court required a plan.[113] The plan, on its face, could not have fulfilled the requirements imposed by the Code,[114] and the

108. There were actually 32 plans proposed, but it was impossible to determine the payout under two of the plans. The 99% is a result of rounding off percentages.

109. There were 21 plans, but one case did not involve unsecured creditors.

110. LoPucki, *supra* note 8, at 268.

111. In Goelzer & Schultz Co., No. 82-01162 (E.D. Wis. filed Apr. 15, 1982), 100% of the voting unsecured creditors voted to accept the plan. In Metanoia Corp., No. 82-04341 (E.D. Wis. filed Dec. 3, 1982), 88% of the unsecured creditors voted to accept the plan. The creditors who voted held 97% of the amount of the claims. In Consolidated Aluminum Corp., No. 82-02183 (E.D. Wis. filed July 1, 1982), 89% of the voting unsecured creditors holding 86% of the amounts of claims accepted. In Kohler Corp., No. 82-02768 (E.D. Wis. filed Aug. 16, 1982), 90% of the unsecured creditors accepted the plan. These creditors held 88% of the unsecured claims.

112. No. 82-03913 (E.D. Wis. filed Nov. 4, 1982).

113. Apparently, the debtor understood 11 U.S.C. § 1121 (1982), to require the filing of a plan within 120 days after the date for the order of relief is granted. *See infra* APPENDIX, Chart III. The only sanction for failing to file a plan within 120 days is that other parties in interest may file a plan and the debtor loses the exclusive right to file a plan. 11 U.S.C. § 1121 (1982).

114. 11 U.S.C. §§ 1123 & 1129 (1982) set out the requirements for confirmation. The plan could not have been confirmed because it did not designate classes or provide

court never held a hearing to approve the disclosure settlement.

The debtor in *4X Corp.*[115] filed its first plan without a disclosure statement. Four months later, the debtor filed an amended plan and disclosure statement although no hearing was ever held. Two large secured banks never agreed to their treatment under the plan and applied to lift the stay immediately after the plan was filed. The unsecured creditors' committee did not object to either plan.

Kohler General Corp.[116] was the only case with a confirmed plan in which the creditors' committee objected to the disclosure statement or plan. The creditors' committee stated that it had no input into the plan and that there was insufficient information to determine whether twenty cents on the dollar was a reasonable figure. The amended disclosure statement stated that the debtor was anxious to get out of Chapter 11 because buyers would not deal with it. Subsequently, the debtor increased the payment to creditors to twenty-five cents on the dollar. The creditors' committee recommended acceptance of the plan. The creditors holding unsecured claims eventually accepted the plan by a vote of 88% of the amounts and 90% of the claims.

Failure to receive confirmation in the *Bernard Cos.* and *4X Corp.* cases was due to secured creditors' opposition or the failure of the debtor to propose a confirmable plan, but not to unsecured creditor opposition. In *Kohler*, the unsecured creditors successfully objected to the plan and only received a 5% increase. From these findings it appears that debtors who proposed confirmable plans acceptable to the secured creditors had no difficulty persuading unsecured creditors to take less than 43% of their claims.

The Kansas City study reasoned that the amounts offered under the plan were "more a product of the debtors' goals in the Chapter 11 proceedings than their ability to pay."[117] The finding which supported this reasoning was that little relation-

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for the treatment of taxes or administrative expenses. Also, no disclosure statement was filed.

115. No. 82-04419 (E.D. Wis. filed Dec. 10, 1982).

116. No. 82-02768 (E.D. Wis. filed Aug. 16, 1982).

117. LoPucki, *supra* note 8, at 269.

ship existed between the financial condition of the debtors and the amounts they were obligated to pay creditors under confirmed plans.[118]

The findings in Milwaukee were similar. For example, *Goelzer & Schultz Co.*,[119] involved a confirmation on a 40% plan, even though according to the debtor's own figures it was a solvent business.[120] Of the five debtors proposing 100% to unsecured creditors, the schedules filed by the debtors indicated all were insolvent except one.[121] The findings in Milwaukee are consistent with the Kansas City conclusion. The goals,[122] rather than the debtors' ability to pay, apparently determined the amount paid to unsecured creditors. Additionally, it appears that the prediction of the Kansas City study is borne out. In Milwaukee, fewer debtors paid 100% than in the earlier Kansas City study.[123]

D. Length of the Proceeding

Although the Kansas City study did not specifically rely upon the debtors' use of delays to support its conclusion, the use of such tactics does support the results. As noted earlier, creditors, when acting in their best interests, may want to demand prompt payment in order to minimize their losses.[124] The debtors, on the other hand, receive the greatest benefit from delaying payment to unsecured creditors for as long as possible. In effect, the debtors receive an interest-free loan at the expense of unsecured creditors.

The creditors' interest in prompt payment must be balanced against the legitimate needs of the debtors to reorganize

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118. *Id.* at 268.

119. No. 82-01162 (E.D. Wis. filed Apr. 19, 1982).

120. These figures come from the schedules filed by the debtor and may therefore be inaccurate.

121. American Leisure Assocs., No. 82-00132 (E.D. Wis. filed Jan. 22, 1982). *See infra* APPENDIX, Chart II.

122. Those goals for filing varied. The goals referred to here are either to minimize payment or to pay in full for "pride, business reputation, or morality." LoPucki, *supra* note 8, at 267-69.

123. The percentage was not found to be larger to a statistically significant degree. *See supra* note 106.

124. *See supra* notes 48 & 49; *see also* LoPucki, *supra* note 8, at 269.

while under the court's protection.[125] Congress felt 120 days (four months) after the debtors' filing was sufficient to reorganize the business in most cases.[126] Congress recognized that flexibility was needed to accommodate individual businesses, and therefore allowed the court to lengthen or shorten the debtors' exclusive period to file a plan for cause shown.[127]

The findings in Milwaukee indicate that the debtors studied were more successful in obtaining Chapter 11 delays than either their Kansas City counterparts or the debtors studied under the Act. Cases in Milwaukee generally took longer than those cases. In Milwaukee, the average time between filing the petition and filing the plan was 193 days,[128] compared to 127 days in Kansas City.[129] An average of twelve months passed between filing a petition and confirmation of the plan in Milwaukee.[130] This compares to ten months in Kansas City[131] and six months under the Act.[132] Finally, it took an average of twelve months to convert or dismiss a case in Milwaukee[133] as compared to six months in Kansas City.[134] This meant that unsecured creditors could be forced to wait up to two and one-half years[135] before receiving any payments.

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125. A plan must be "feasible" in order to be confirmed. 11 U.S.C. § 1129 (1982). A plan cannot be confirmed if afterwards the business is likely to be liquidated. 11 U.S.C. § 1129(a)(11) (1982).

126. 11 U.S.C. § 1121(c)(2) (1982) provides that a debtor in most cases has an exclusive right to file a plan for the first 120 days after the date of the order for relief. This is extended to 180 days if a debtor has proposed a plan. 11 U.S.C. § 1121(c)(3) (1982). "In most cases, 120 days will give the debtor adequate time to negotiate a settlement, without unduly delaying creditors." H. R. REP. NO. 595, 95th Cong., 1st Sess. 232 (1977).

127. 11 U.S.C. § 1121(d) (1982).

128. *See infra* APPENDIX Chart III. The mean is 6.3 months. The standard deviation is 3.629, and n=20 data points.

129. LoPucki, *supra* note 8, at 123. The Stanley & Girth study did not compute the time between obtaining an order for relief in filing a plan.

130. *See infra* APPENDIX, Chart III. The mean is 12.25 months. The standard deviation is 3.888, and n=12 data points.

131. LoPucki, *supra* note 8, at 123.

132. D. STANLEY & M. GIRTH, *supra* note 10, at 143.

133. *See infra* APPENDIX, Chart III. The mean is 11.97 months. The standard deviation is 6.656, and n=31 data points.

134. LoPucki, *supra* note 8, at 123. There is no comparable data in the Stanley & Girth study.

135. Six months will elapse from the time of default until suit is filed for trade debts less than $10,000. *See* LoPucki, *supra* note 8, at 261-62. Another six months will typically be consumed if the debtor offers minimal resistance. *Id.* Then, on average, credi-

Debtors may have learned in the two years since the Kansas City study how to more effectively use the delays inherent in the Chapter 11 proceedings. The unsecured creditors' alternative to letting the business run its course while under the protection of the Code in most cases studied was a liquidation, yielding nothing to them.[136] In effect, the unsecured creditors had no choice; they could either wait until the debtor decided to propose a plan or move to convert and commit financial suicide.

There are less cynical explanations for the lengthier proceedings in Milwaukee. The longer proceedings in Milwaukee may simply reflect a difference in the districts. A number of attorneys who represented debtors stated that in order to comply with the feasibility requirement under the Code,[137] they would not propose plans unless they were certain the debtor would succeed. In addition, they considered the 120 day exclusive period under the Code[138] to be an insufficient time to determine feasibility. The findings in the Kansas City and in the Stanley & Girth study do not support this rationale. Both studies had higher success rates of 28% to 33%[139] and took six to ten months to have the plans confirmed. The businesses in those studies obtained a better success rate in less time.

E. Conclusion

The findings in Milwaukee support the conclusion that the debtors retained control. Unsecured creditors generally could not close businesses destined to fail even where they were identified. The needed change of management rarely occurred. Unsecured creditors could not effectively negotiate their treatment under the proposed plans, and the debtors studied ap-

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tors in Milwaukee must wait 12 months before a plan is confirmed. *See infra* APPENDIX, Chart III. Two plans were confirmed 19 months after filing. *Id.*

136. This was revealed by the schedules and from the estate administrator's minutes of the § 341 meeting in which the debtor's attorney frequently made such a statement.

137. 11 U.S.C. § 1129(a)(11) (1982) provides that the court shall only confirm a plan if "[c]onfirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan."

138. *See infra* note 184.

139. LoPucki, *supra* note 8, at 107-08.

peared to use the delays more effectively in Chapter 11 than their counterparts under the Act or in Kansas City.

III. REASONS FOR INADEQUATE CREDITOR CONTROL

A. Creditors' Committees Failed to Operate

Congress mandated that a creditors' committee be appointed in every case arising under Chapter 11[140] and envisioned that the committees would operate as the primary negotiating bodies to formulate the plan.[141] Unsecured creditors were to rely primarily on the committee to protect their interests and control the debtor.[142] Congress broadened the committee's powers to fulfill these functions by enabling it to consult with the debtor, investigate, participate in the formation of the plan, and hire attorneys, accountants or other agents.[143]

The findings indicate that unsecured creditor participation on the creditors' committee was far less than Congress had envisioned in all districts. As Table 3 shows below, the committees were active[144] in only 16% to 38% of the cases, although they were appointed in 49% to 85% of the cases.

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140. 11 U.S.C. § 1102(a)(1) (1982) provides that "[a]s soon as practicable after the order for relief under this chapter, the court shall appoint a committee of creditors holding unsecured claims." Commentators interpret this to mean that a committee must be appointed in every case. DeNatale, *supra* note 90, at 46; *see* Blaine & Erne, *supra* note 90, at 492 n.6; Moller, *supra* note 4, at 458.

141. *See* H. R. REP. No. 595, 95th Cong., 1st Sess. 401 (1977).

142. The House Report states that the committee of creditors is "designed to deal with the debtor in a more manageable way than the entire body of creditors could. They are representative bodies that must speak for the groups of creditors with similar interests." *Id.* at 235.

143. *See* 11 U.S.C. § 1103(c) (1982).

144. *See infra* note 158.

TABLE 3
APPOINTMENT AND ACTIVITY OF CREDITORS' COMMITTEES

	K.C.[145]	Pilot[146]	Non-Pilot[147]	Milw.[148]
Creditors' Committees Appointed (Percent "Yes")	40%	65%	85%	61%
Median Number of Days from Filing to Appointment of Creditors' Committee	N/A	19	22	30
Did Creditors' Committees Appoint Counsel (Percent "Yes")	19%	38%	16%	27%

The appointment process apparently influenced the degree of creditor involvement. The non-pilot districts of the trustee study had the highest percentage of creditors' committees appointed. The high percentage in the non-pilot districts apparently resulted from those districts following the statutory mandate to automatically appoint[149] the seven largest creditors.[150] In Kansas City, committees were first drafted in a

145. LoPucki, *supra* note 8, at 124-25.

146. N. AMES, L. STELLWAGON & R. JONES, *supra* note 14, at 58.

147. *Id.*

148. *See infra* APPENDIX, Chart IV.

149. In eight of the nine pilot districts, appointment was handled by mail. The clerk sent a letter notifying creditors of their appointment. Usually, creditors were required to accept in writing. In two districts, appointment was automatic and no response was required. In one non-pilot district, creditors were assumed to have accepted unless they responded to the contrary. N. AMES, L. STELLWAGON & R. JONES, *supra* note 14, at 52.

150. 11 U.S.C. § 1102(a)(1)(1982), provides: "As soon as practicable after the order for relief under this chapter, the court shall appoint a committee of creditors holding unsecured claims."

11 U.S.C. § 1102(b)(1) provides: "A committee of creditors appointed under subsection (a) of this section shall ordinarily consist of the persons, willing to serve, that hold the seven largest claims against the debtor . . . ."

manner similar to the non-pilot districts. This was discontinued shortly after it began.[151]

Unlike the non-pilot districts or the Kansas City study, the Milwaukee court appointed creditors to the committee after the estate administrator[152] solicited their involvement and informed them of the committee's role in the proceedings at an informal meeting of large creditors.[153] The court did not appoint a committee if creditors were not interested.

The procedure in Milwaukee was similar to that followed in the pilot districts. In four of the nine pilot districts, the U.S. trustees[154] solicited members of the creditors' committee with letters and phone calls.[155] The U.S. trustees relied completely on telephone solicitation in four other districts.[156] The U.S. trustees, in all but one of the pilot districts, appointed the creditors' committee at a creditors' conference held before the initial Section 341 meeting.[157] As a result, creditors' committees were appointed in 65% of the cases in the pilot districts.

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151. Interview with Lynn M. LoPucki, University of Wisconsin Professor (Spring, 1984).

152. Congress authorized the appointment of a deputy clerk-estate administrator for each non-pilot bankruptcy court to begin on April 1, 1981. The duties of the estate administrator regarding Chapter 11 cases are to develop and implement status reporting activity, assist in organizing the creditors' committee, conduct the initial meeting of creditors until a chairman is elected, advise the clerk of the bankruptcy court regarding financial status and prospectus for reorganization, and monitor cases filed under Chapter 11 to insure adequate progress. Nothing in the job description provides that the estate administrator may file motions. Memorandum from Berkely Wright, Chief, Division of Bankruptcy, Administrative Office of the United States Courts, to the Clerks of the Bankruptcy Court in Non-United States Trustee Pilot Districts (January 27, 1981).

153. The judges in Milwaukee initiated the informal meeting. Although not required by the Code, the judges sent a letter to the 20 largest unsecured creditors asking them to attend the informal meeting. The estate administrator chaired the meeting of the large unsecured creditors prior to the required initial meeting of creditors. At the informal meeting the debtor made a brief statement, and after explaining the Chapter 11 proceedings and the role of the creditors' committee, the estate administrator solicited creditors for the committee.

154. United States Trustees will be referred to as "U.S. trustee." The U.S. trustee in pilot districts is responsible for the administration of the Chapter 11 cases including the solicitation of creditors' committees. "The main purpose of the U.S. Trustee [was] to remove administrative duties from the bankruptcy judge, leaving the bankruptcy judge free to resolve disputes untainted by knowledge of matters unnecessary to judicial determination." 123 CONG. REC. 217 (Jan. 4, 1977) (statement of Hon. Donald Edwards). *See* 11 U.S.C. § 151102(a) (1982).

155. N. AMES, L. STELLWAGON & R. JONES, *supra* note 14, at 52.

156. *Id.*

157. *Id.*

All three studies used the committees' employment of counsel as the test of whether the committee was active.[158] Creditors' committees were not always active. As Table 3 indicates, the pilot districts had the greatest unsecured creditor involvement, with attorneys for the committee appointed in 38% of the cases. The non-pilot districts with the highest incidence of committees appointed had the lowest percentage of attorneys; attorneys were appointed for the committees in only 16% of the cases.

Unsecured creditor participation on the creditors' committee occurred most often in pilot districts. Milwaukee's similarity in committee appointment with the pilot district, resulted in similar percentages and the two highest rates of involvement. Active involvement by either an estate administrator or U.S. trustee in soliciting committee members yielded a 40% to 137% increase[159] in involvement over the non-pilot districts, which merely appointed the seven largest unsecured creditors. Without the solicitation of an estate administrator or U.S. trustee, unsecured creditors were not active in 81% to 84% the cases.[160] The higher involvement in the pilot districts and Milwaukee suggests that committees only become organized when someone initiates the process.

Initiation of the committee process appears to be more important than financial incentives in obtaining an active committee. Generally, it is assumed that if financial incentives do not exist, creditors will not become involved. Not surprisingly, creditors in Milwaukee were active in few cases, and those cases in which they were active involved most of the assets.[161] A correlation appears[162] to have existed in Milwau-

158. In Milwaukee, the creditors' committees without counsel did not participate to any noticeable extent. This was also found to be the case in the U.S. trustee study and Kansas City study. N. AMES, L. STELLWAGON & R. JONES, *supra* note 14, at 56; *see* LoPucki, *supra* note 8, at 253.

159. A comparison between Milwaukee and Kansas City yields a 40% increase, and a comparison between the pilot and non-pilot district yields a 137% increase.

160. An estate administrator or trustee was not involved in Kansas City. Creditors' committees were active in only 19% of the cases.

161. The assets in Milwaukee totalled $82,255,807. Creditors' committees hired attorneys in thirteen cases with debtor scheduled assets of $54,363,195, or 66% of the total assets scheduled. *See infra* APPENDIX, Charts II & IV. This percentage would decrease to 43% if 4X Corp., representing approximately one-third of the total assets scheduled, was excluded. 4X Corp. had scheduled assets of $33,100,423. *Id.* at Chart II.

kee between unsecured creditor involvement and the amount of the assets in the case. This finding differs from Kansas City. In Kansas City, creditors' committees retained attorneys in cases representing only 17% of the assets scheduled.[163] It seems unlikely that unsecured creditors in Kansas City were less motivated by financial incentives than their Milwaukee counterparts. Rather, Kansas City creditors lacked either an estate administrator or U.S. trustee to initiate the process.

Even when someone initiated the committee process, unsecured creditors failed to participate on committees in at least 62% of the cases studied. The Kansas City study opined that "bankruptcy legislation had failed . . . to make [creditor] participation profitable"[164] and was inherently flawed.[165]

The failure of creditors' committees to function undermines the Code's scheme to monitor the debtor or insure a meaningful reorganization. The incentives[166] of the debtor to remain in Chapter 11 were not countered. Debtors in non-pilot districts continued to operate, almost uncontrolled, as long as they met current operating expenses. If committee solicitation failed in the pilot districts, the U.S. trustee provided the needed control.

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162. This was not confirmed to a statistically significant level. The Wilcoxon Rank-Sum test was used to determine whether firms with unsecured creditor involvement are larger or smaller than those without unsecured creditor involvement. The following null hypothesis was accepted and the alternative hypothesis rejected:

H: All debtors with involvement of unsecured creditors have the same total assets scheduled.

A: The debtors with involvement of unsecured creditors tend to have different amounts of assets than those without unsecured creditor involvement.

The null hypothesis was accepted at a significance level of 0.1019.

163. In Kansas City, there were assets totaling $51,274,849. Attorneys represented creditors' committees in cases involving $8,565,353 worth of assets. *See* LoPucki, *supra* note 8, at 120-21, 124-25.

164. LoPucki, *supra* note 8, at 248.

165. That study cited creditors' lack of financial incentives to participate on the committee, the lack of qualifications of committee members to aid in reorganization, the inherent weakness of the committee forum to perform its function of investigating, and the distance between the court, debtor and members of the committee as reasons for committee ineffectiveness.

166. LoPucki, *supra* note 8, at 114-17.

B. Secured Creditors Protected Their Own Interests Exclusively

The protection of secured creditors' rights were generally not considered in any of the studies. They could protect their interests by moving[167] to lift the automatic stay and receiving adequate protection[168] from the debtor. If the debtor failed to provide adequate protection, the court lifted the stay and the secured creditor proceeded to foreclose under state law.

C. Opposition: Not Necessarily Keeping the Debtor Under Control

The Code provides creditors with the means to close nonviable businesses and to remove poor management.[169] The Kansas City study found that these means were not necessarily used to close nonviable debtors or remove poor management. It found that opposition flourished in the wrong cases, large cases destined for success,[170] and that the means were more likely used to strike a better bargain or possibly to increase the fees of the attorney for the committee.[171] Opposition was defined in the Kansas City study as "actions taken of record in the case which had either as their ostensible purpose or their natural consequence the closing of the business."[172]

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167. In 1982, a request for relief from the stay was an adversary proceeding. In 1983, relief from the stay was treated as a motion and will hereinafter be referred to as such. *See* BANKRUPTCY RULE 4001.

168. 11 U.S.C. § 362(d)(1982) provides for relief from the stay for "lack of adequate protection of an interest in property"; 11 U.S.C. § 363(e) (1982), provides that the court on request of a party interested shall condition the use, sale or lease of property as is needed to provide adequate protection. 11 U.S.C. § 364(d)(1982), provides that senior or equal liens may be given to secure new credit only if existing secured creditors receive adequate protection of their interests. *See* James & Kirkland, *Adequate Protection Through Augmented Interests in Reorganization Plans*, 58 AM. BANKR. L.J. 69, 77-78 (1984); *see also* Axe, *Penetrating the Iron Curtain: Representing Secured Creditors in Chapter 11 Reorganization Proceedings*, 67 MARQ. L. REV. 421, 427-39 (1984).

169. These means include motions to employ a trustee or examiner, to convert the case to Chapter 7 or dismiss it, to prohibit the use of cash collateral or prohibit the use or sale of other collateral, to shorten the time for filing a plan of reorganization, to require the debtor to indemnify the estate, to file a liquidating plan of reorganization, and to oppose borrowing by the debtor. LoPucki, *supra* note 8, at 111.

170. *Id.* at 110.

171. *Id.* at 112.

172. *Id.* at 110.

The Kansas City study classified opposition as either "strong," "mild," or "none."[173]

TABLE 4
OPPOSITION/SUCCESS CORRELATION

	Kansas City[174]		Milwaukee[175]	
Strong Opposition Compared to Successes	5/11	(45%)	2/12	(17%)
Creditor Motions to Convert Compared to Successes	6/11	(55%)	1/12	(8%)
Creditor Motions to Convert Compared to Failures	7/30	(23%)	8/33	(24%)

Table 4 indicates that the high correlation between successful cases and strong opposition or motions to convert in the Kansas City study were not found in Milwaukee.[176] Creditors mounted strong opposition in only two (17%) of the suc-

173. " 'Strong' opposition typically would continue during the entire pendency of the case; 'mild' opposition typically was sporadic, and led to some accommodation between the debtor and the opposing creditor." *Id.* at 111.

174. *See id.* at 111, 120-21.

175. *See infra* APPENDIX, Chart III. Cases with little opportunity for opposition were omitted in the comparison between motions to convert and failures. *See* LoPucki, *supra* note 8, at 111 n.56. This included one case.

176. The correlation between motions to convert and successful cases in Milwaukee and Kansas City was different to a statistically significant degree. The number of motions to convert in successful cases in Kansas City was found to be larger than the number of motions to convert in successful cases in Milwaukee to a statistically significant degree. Two tests were conducted on the following null hypothesis:

H: The number of motions to convert in successful cases are the same in Milwaukee and Kansas City.

The following alternative hypothesis was tested using the chi-squared test of homogeneity:

A: The proportion of motions to convert in successful cases in Kansas City is different than the proportion of motions to convert in successful cases in Milwaukee.

The chi-squared test of homogeneity resulted in a significance level of 0.0161, meaning the alternative hypothesis was accepted.

The Fisher-Irwin test was used to test the following alternative hypothesis:

A: The proportion of motions to convert in successful cases in Kansas City is greater than the proportion in Milwaukee.

The level of significance using the Fisher-Irwin test was found to be 0.0239, meaning the alternative hypothesis was accepted.

cessful cases in Milwaukee as compared to five (45%) in Kansas City.[177] Creditors in Milwaukee moved to convert in only one (8%) successful case. In contrast, over half (55%) of the successful cases in Kansas City had motions to convert brought by creditors.

Milwaukee attorneys may not have been motivated to use opposition to strike a better bargain or mount fees of attorneys for the creditors' committee. Attorneys, with three more years of experience with the Code, may have been better able to identify cases destined to fail and limit their opposition to those cases.

Creditors did not, however, move to convert cases in which they probably would not be paid. In both Milwaukee and Kansas City, creditors' motions to convert were not brought in most cases destined to fail. This is not surprising since unsecured creditors usually receive nothing in the event of liquidation under Chapter 7.[178]

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177. This difference could not be confirmed to a statistically significant level. There is not enough evidence to reject the hypothesis that the proportion of successful cases with strong opposition is the same in Kansas City and Milwaukee. Two separate tests were conducted and both yielded the above conclusion.

First the chi-squared test of homogeneity was performed on the following alternative hypothesis:

A: The proportion of successful cases with strong opposition is not the same in Milwaukee as in Kansas City.

The chi-squared test of homogeneity resulted in a significance level of 0.3400, meaning the alternative hypothesis could not be accepted.

When testing the data using the Fisher-Irwin test, the following alternative hypothesis was compared against the null hypothesis:

A: The proportion of successful cases with strong opposition in Milwaukee is less than the proportion in Kansas City.

The significance probability was 0.1483, meaning the alternative hypothesis could not be accepted.

178. *See supra* note 136 and accompanying text.

TABLE 5
OPPOSITION/SIZE/SUCCESS CORRELATION

	Kansas City[179]	Milwaukee[180]
Strong Opposition Compared to Large Asset Cases*	14/22 (64%)	9/23 (39%)
Strong Opposition Compared to Small Asset Cases*	2/22 (9%)	4/24 (17%)
Success Compared to Large Asset Cases*	9/22 (41%)	8/23 (35%)
Success Compared to Small Asset Case*	2/22 (9%)	4/24 (17%)

* The cases in Chart 2 of the Appendix were divided in half. Those in the upper half are large asset cases; those in the lower half are small asset cases.

As Table 5 illustrates, creditors in Kansas City and Milwaukee brought strong opposition where financial incentives to liquidate most likely existed. Strong opposition in Milwaukee occurred twice as often in large asset cases as in small asset cases. Strong opposition in Kansas City occurred seven times as often in large asset cases as in small asset cases. The correlation between size and strong opposition was found to be statistically significant.[181] Small asset cases which had the lowest success rate also had the lowest rate of opposition.

It appears that strong opposition correlates with size and not success.[182] The correlation between success and opposi-

179. Four cases were excluded because there was little opportunity for opposition. *See* LoPucki, *supra* note 8, at 111 n.56.

180. *See infra* APPENDIX, Chart II.

181. The Wilcoxon Rank-Sum test was performed to determine whether debtors with strong opposition were larger than those without strong opposition. The following alternative hypothesis was accepted over the null hypothesis with a level of significance equal to 0.0399:

H: All debtors have equal total assets regardless of the degree of opposition.

A: Debtors with strong opposition had a larger amount of scheduled assets.

182. The Wilcoxon Rank-Sum test was performed to determine whether successful debtors were larger than those who failed. The following null hypothesis was accepted with a level of significance equal to 0.1123:

H: All debtors have equal total assets regardless of their success.

tion, found in successful Kansas City cases, tended to be large.[183] Creditors did not have economic incentives to close small asset nonviable businesses but only to mount opposition in large asset cases.

D. Non-Debtor Proposed Plans Provided No Realistic Control

Congress generally limited the debtor's exclusive right to file a plan of reorganization to 120 days.[184] This constraint was imposed in order to bring pressure upon the debtor to negotiate terms and work out a reorganization within a reasonable period of time.[185]

The Kansas City study found that the average time between filing the plan and the petition was 127 days.[186] The debtors in Kansas City apparently perceived the loss of this exclusiveness as a threat, as did many debtors in Milwaukee. Of the nineteen initial plans filed in Milwaukee, eight (42%) were filed roughly[187] within the 120 day period. If plans were filed later than 120 days, debtors usually requested extensions of the 120 day period which were readily granted by the court.[188]

Little evidence existed that the loss of the exclusive period posed any threat. In the Eastern District of Wisconsin only one non-debtor proposed plan of liquidation was filed.[189] No disclosure statement was filed in that case and the court never considered the plan. Two non-debtor plans were filed in Kan-

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A: Successful debtors are larger.

183. LoPucki, *supra* note 8, at 108-09.

184. 11 U.S.C. § 1121(b) (1982) provides that only the debtor may file a plan during the 120 days after the date of the order for relief. 11 U.S.C. § 1121(d) (1982), provides that the court may reduce or increase the 120-day period for cause.

185. Congress felt a reasonable period was 120 days: "In most cases, 120 days will give the debtor adequate time to negotiate a settlement, without unduly delaying creditors." H.R. REP. 595, 95th Cong., 1st Sess. 232 (1977).

186. LoPucki, *supra* note 8, at 123.

187. *See infra* APPENDIX, Chart III. The mean was 192.95 days. The standard deviation was 110.90 days, and n=20 data points. *Id.* The 120 day period is estimated from the months.

188. While the court did not always grant an extension for the length of time requested, it never denied an extension in cases studied.

189. Conservation Update Publications, Inc., No. 82-03509 (E.D. Wis. filed Oct. 10, 1982).

sas City, neither of which was ever considered for confirmation.[190]

The Kansas City study concluded that it was unrealistic to believe that creditors would propose operating plans[191] since creditors usually lacked information and the businesses generally could not survive without the involvement of the owner-manager.[192] The findings in Milwaukee support these rationales. Creditors received detailed information from a court appointed examiner in only one case[193] and then promptly imposed a trustee. All the businesses studied in Milwaukee were closely held,[194] and many could not have operated without the principal owner.

E. Trustees and Examiners Were Seldom Used to Investigate Desirability of Continuing Business

Upon a motion of a party in interest, the court may appoint an examiner or trustee to investigate allegations of fraud, dishonesty, gross mismanagement, the financial condition of the debtor, the operation of the debtor, the desirability of the continuance of the business and any other matter relevant to the case or formation of a plan.[195]

The Kansas City study found that most businesses entered Chapter 11 to avoid imminent liquidation and then failed within six months after filing.[196] The findings in Milwaukee were similar. Of the forty-four cases in Milwaukee where the precipitating factor for filing was known, twenty-seven (61%) were the result of direct creditor pressure which could have closed the business within two weeks.

The Kansas City study reasoned that this should have prompted either the creditors' committee or the court to put a stop to these businesses, and that the most likely way to investigate the desirability of continuance would have been the em-

190. LoPucki, *supra* note 8, at 254.

191. *Id.* at 253-57.

192. *Id.* at 256.

193. *See infra* APPENDIX, Chart IV.

194. *See supra* notes 92-94 and accompanying text.

195. *See* 11 U.S.C. § 1104(a)(1) & (b) (1982). *See generally* Berdan & Arnold, *Displacing the Debtor in Possession: The Requisites for and Advantages of the Appointment of a Trustee in Chapter 11 Proceedings,* 67 MARQ. L. REV. 458 (1984).

196. LoPucki, *supra* note 8, at 123, 258-59.

ployment of a trustee or examiner.[197] However, the Kansas City study found that this was done in only three (6%) cases.[198]

TABLE 6
APPOINTMENT OF EXAMINERS AND TRUSTEES

	K.C.[199]	Milw.[200]	Non-Pilot[201]	Pilot[202]
Appointment of Examiner	6%	2%	N/A	N/A
Appointment of Trustee	10%	10%	N/A	N/A
Motion and sua sponte Order for Examiner	N/A	2%	5%	7%
Motion and sua sponte Order for Trustee	N/A	10%	17%	40%

The court rarely appointed a trustee or examiner to investigate the desirability of continuing the business in any of the districts studied. As Table 6 indicates above, the appointment of trustees and examiners[203] was fairly uniform throughout the districts studied except for appointments of trustees in the pilot districts.[204]

Even when examiners and trustees were appointed, the findings in Milwaukee and Kansas City indicate that they did not necessarily investigate the desirability of continuing the

197. *Id.* at 259.
198. *Id.*
199. *Id.* at 124-25.
200. *See infra* APPENDIX, Chart IV.
201. N. AMES, L. STELLWAGON & R. JONES, *supra* note 14, at 74-75.
202. *Id.*
203. The slightly higher figures in Table 6 in the non-pilot and pilot districts can be accounted for because they included motions which may not have been granted. *Id.* at 73.
204. The higher percentages of trustees appointed or moved for in pilot and non-pilot districts are misleading because the trustees were frequently appointed for an orderly liquidation rather than to run the business or investigate the desirability of continuing the business. The trustee study does not give enough information to draw any conclusions regarding the high percentage of trustee appointments for the pilot districts. *Id.*

business. The courts in Milwaukee appointed a trustee in one case to determine the desirability of continuing the business.[205] In two cases,[206] the trustee took over the business for the purpose of preserving the assets for an orderly liquidation, and in one case,[207] the trustee found tenants to rent the debtor's property. An examiner was employed in one case[208] to investigate fraud rather than determine the viability of the business. In the Kansas City study, examiners were appointed in three cases to determine the desirability of continuing the business. A trustee was never appointed for such a purpose in Kansas City.[209]

These findings are somewhat troubling. Congress and commentators believed that one of the first tasks of the creditors' committee would be to determine whether the present management of the debtor should be retained.[210] If there is any money available, the appointment of an examiner is the most convenient way for creditors to determine the viability of the business. The examiner can provide an objective viewpoint of the business based on knowledge gained from examination of the debtor and the debtor's business records. The information would not be a direct cost to the individual creditor because the examiner's fees would be paid by the estate.[211]

Creditors may be foregoing the use of these tools to keep down administrative expenses of the estate, or the estate might not be able to financially support an examiner. Another explanation is ignorance. Creditors and their attorneys perhaps believe that trustees or examiners should only be used when there exists gross mismanagement or blatant fraud. Only recently has the appointment of an examiner emerged as a potentially useful remedy in pilot districts.[212] Rather than

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205. 4X Corp., No. 82-04419 (E.D. Wis. filed Dec. 12, 1982).

206. A.W. Huss Co., No. 82-00097 (E.D. Wis. filed Jan. 18, 1982); Plunkett, O. & M., No. 82-01119 (E.D. Wis. filed Apr. 15, 1982).

207. Pavek Bros. Farms, No. 82-02694 (E.D. Wis. filed Aug. 9, 1982).

208. *A.W. Huss*, No. 82-00097.

209. LoPucki, *supra* note 8, at 259.

210. H.R. REP. No. 595, 95th Cong., 1st Sess. 220 (1977); J. TROST, A. TREISTER, L. FORMAN, K. KLEE & R. LEVIN, *supra* note 25, at 261-62.

211. 11 U.S.C. § 330(a) (1982) allows fees of an examiner to be paid by the court upon approval of the court.

212. N. AMES, L. STELLWAGON & R. JONES, *supra* note 14, at 76. The examiner in the pilot districts usually answers the following questions: Is the debtor's business

limiting the appointment of an examiner to cases where fraud is suspected, some pilot districts are appointing examiners as fact-finders in cases where the debtor is barely solvent and not moving toward proposing a plan.[213] The U.S. trustee, or any party in interest, can then use the examiner's report to support motions before the court.[214]

Creditors without the appointment of an examiner or trustee did not investigate whether the business should continue. Consequently, the decision of whether the business should continue to operate was left solely to the debtor and the major secured creditor.

F. Preferences Were Not Attacked

The ability to recover preferential transfers[215] insures that debtors do not prefer any creditor over another in the period immediately before bankruptcy. The 1978 Code made the recovery of preferences much simpler than it had been under the Act. The Code presumes insolvency during the ninety day period preceding the filing of a petition and eliminates the reasonable cause requirement.[216]

There was little evidence in the cases studied that preferences were widely attacked. Evidence existed in two of the cases[217] studied in Milwaukee that preferences were attacked. It is difficult to determine whether these preferences were made and it may be that preferences were not given in any of the other cases. Since most of the debtors studied were unso-

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viable? Will it be able to move toward a plan? Will it be able to achieve breakeven? Does it have a viable market share? Is its pricing competitive?

In other words, the examiner is asked to do a complete analysis of the business as a going concern and to return with recommendations for action (e.g., conversion if no reorganization seems likely). *Id.*

213. *Id.*

214. *Id.*

215. A preference is defined as a transfer or payment which is given within 90 days, or one year if to an insider, before filing the petition enabling a creditor to receive more than it would receive under Chapter 7 or if the transfer had not been made. 11 U.S.C. § 547(b) (1982).

216. *See* J. TROST, A. TREISTER, L. FORMAN, K. KLEE & R. LEVIN, *supra* note 25, at 155-56. Under the Act the party attacking the preference had to prove that the debtor was insolvent at the time of payment and that the creditor had reasonable cause to believe the debtor was insolvent at the time of transfer.

217. Doelger & Kirston, Inc., No. 82-01836 (E.D. Wis. filed June 4, 1982); Plunkett, O. & M., No. 82-01119 (E.D. Wis. filed Apr. 15, 1982).

phisticated "mom and pop" businesses and had little choice of when to file,[218] it seems reasonable that some debtors would have preferred creditors.

Creditors' committees with attorneys occurred in only 16% to 38% of the cases, and therefore there was no one to pursue preferences if they were given. Attacking the preferences may have gone against the interests of the individual creditors on the committee who themselves received preferences. Committee members may have felt that attacking a payment on a debt due a fellow creditor was unfair.

However, if preferences were given in the small cases and were not recovered, one more control was removed. The debtor may be less likely to effectuate an early plan because creditors of concern to them will have been paid.

IV. ELIMINATING DEBTOR CONTROL

A. Greater Use of Examiners and Trustees to Investigate

Unsecured creditors could many times maximize their return only in cases involving nonviable businesses by either ousting the debtor-in-possession to change management, or by immediately selling the business to a willing purchaser before the debtor did any further damage. Both alternatives required creditors to have detailed information about the business' operations.

One method by which creditors could have obtained detailed information was through the appointment of a trustee or examiner for investigative purposes. All the studies found a relatively infrequent use of trustees or examiners. Either the courts or the creditors did not recognize that the discovery of information was necessary to bankruptcy cases. The U.S. Trustee study noted that the pilot districts used examiners in increasing numbers as fact-finders in marginal cases. Other districts should follow this lead to obtain information whenever possible. Creditors will then place themselves in a better position to determine the viability of the business and its management, persuade a buyer to purchase the business, or support future motions.

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218. *See supra* note 196 and accompanying text.

B. Amend Chapter 13

One solution to debtor control might be to modify Chapter 13 to include corporations and all businesses which meet the debt requirements.[219] Chapter 13 does not contemplate unsecured creditor involvement,[220] but calls for a plan to be filed with the petition[221] so that creditors can begin receiving payments shortly after filing. Since this study found that small asset cases usually did not have unsecured creditor involvement, those cases would then be monitored by the Chapter 13 trustee.

This change is not a complete solution since large asset cases in which the assets were fully encumbered likewise did not have unsecured creditor involvement. These cases would again "slip through the cracks." Amending Chapter 13 would only be a temporary solution if the U.S. trustee system is not adopted. Additionally, amending Chapter 13 may resurrect the problems corrected by merging Chapter 11 with Chapter X[222]and consequently be a step backwards.

C. Adopt U.S. Trustee System

The solution to many of the problems discussed would be to adopt the U.S. trustee system or some similar administrative arm of the bankruptcy court which had been recommended prior to the approval of the Code.[223] Unregulated debtor control occurred in cases the creditors did not actively monitor. The U.S. trustee can encourage creditors to be active and, if this fails, step into the creditors' role to monitor the debtor.

The findings support the adoption of the U.S. trustee system. The pilot districts had the greatest creditor involvement. Involvement by a U.S. trustee yielded up to a 137% increase in involvement of unsecured creditors over non-pilot dis-

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219. 11 U.S.C. § 109(e) (1982) requires unsecured debts to be under $100,000 and secured debts to be less than $350,000.

220. A standing trustee is appointed for all cases. *See* 11 U.S.C. § 1302 (1982).

221. *See* BANKRUPTCY RULE 3015.

222. One of the reasons for consolidating Chapter X in Chapter XI of the Act was to dispose of "the costly and uncertain litigation needed to determine whether the case should proceed under Chapter X or XI." H.R. REP. No. 595, 95th Cong., 1st Sess. 223 (1977).

223. Kennedy, *supra* note 28, at 63-64.

tricts.[224] Even the involvement of an estateadministrator, with fewer statutory powers than a U.S.trustee, yielded at least a 40% increase in the creditor involvement over other non-pilot districts.

Lack of financial incentives has meant that creditors in many cases, and particularly in low asset cases, failed to mount opposition to debtors or bring motions to convert where the business was destined to fail. This study concluded that bringing a motion to convert usually meant financial suicide for creditors.[225] Likewise, the expense to creditors and the estate of bringing a motion to oppose the debtor may have kept creditors from opposing the debtor.

U.S. trustees are better able to bring motions which have the effect of closing a business when creditors exhibit no interest in the case and the business is nonviable. A concern may exist that the U.S. trustee may move to convert or oppose viable businesses. However, creditors can oppose such motions when not in their best interests.[226]

Probably the greatest obstacle confronting the adoption of the U.S. trustee system is the belief that an administrative government agency should not play a paternal role in cases in which creditors have no interest. In most cases filed, creditors did not have sufficient economic incentives under the present law to control the debtor. Rather, the bankruptcy law encourages debtors to enter bankruptcy and operate in it as long as possible.[227] Unless the Code were to provide, as do antitrust laws,[228] economic incentives to creditors to pursue abusive or non-reorganizing debtors, then it seems the imbalance of the Code should be countered by the involvement of a U.S. trustee.

The involvement of the U.S. trustee could help correct the fundamental flaw in the Chapter 11 concept identified by the Kansas City study. While Chapter 11 was designed only to serve the debtor who sought meaningful reorganization, no provisions were made for the debtor who filed to delay credi-

224. *See supra* note 159.

225. *See supra* note 136 and accompanying text.

226. This is unlikely to happen because creditors are not involved in these cases.

227. *See supra* notes 124-25 and accompanying text.

228. Antitrust legislation allows injured parties to collect three times their actual damages plus the cost of suit and reasonable attorneys fees. 15 U.S.C. § 15(a) (1982).

tors and reduce debt with no intention of risking a change in management.[229] This study confirms that most debtors entered Chapter 11 to avoid an imminent closing of the business with little likelihood of reorganization. Chapter 11 enabled those businesses to continue operating, thereby depleting assets through salaries and other administrative expenses, with little possibility of reorganization. The implementation of the U.S. trustee system is one tried and proven solution to correct the problem of the debtor in full control.

POSTSCRIPT

After this article was completed, Congress adopted the U.S. trustee system as the solution to debtor control.[230] The U.S. trustee system is a new concept for non-pilot districts, including both the Eastern and Western Districts of Wisconsin.[231] This article suggested that the U.S. trustee system, which has now been adopted, was much needed. More importantly, however, the author hopes this article will aid practitioners in obtaining an overview of the Chapter 11 bankruptcy practice, enabling them to utilize the mechanisms available to creditors under the Code, which will remain in effect after the U.S. trustee system is fully implemented.

229. LoPucki, *supra* note 8, at 273.

230. Bankruptcy Judges, United States Trustees, and Family Farmers Bankruptcy Act of 1986, Pub. L. No. 99-554, 100 Stat. ___ (codified in scattered sections of 11 U.S.C. and 28 U.S.C.).

231. *Compare* 28 U.S.C. § 581(a) (1982) *with* Bankruptcy Judges, United States Trustees, and Family Farmers Bankruptcy Act of 1986, Pub. L. No. 99-554, § 111, 100 Stat. ___ (amending 28 U.S.C. § 581(a)).

APPENDIX

CHART I — TYPE OF FILINGS

Case #	Name of Debtor	Type of Business	Number of Stockholders	Date Business Started	Place of Origin	Precipitator of Chapter 11 Filing*
82-00097	A.W. Huss Co.	Wholesale	2	9-37	Milwaukee Area	(C) Secured Creditor
82-00098	Stanley J. Matson & Son, Inc.	Construction	1	1932	Racine County	(C) IRS
82-00116	North Side Heating & Sheet Metal Inc.	Construction	1	4-79	Racine County	(N)
82-00132	American Leisure Associates, Inc.	Service	1	3-73	Milwaukee Area	(F) Secured Creditor
82-00260	Realty Construction, Inc.	Real Estate/ Construction	2	1979	Milwaukee Area	(C) Secured Creditor
82-00283	Dor-Phil, Inc.	Services	2	6-70	Milwaukee Area	(C) Unsec. Creditor
82-00307	Marina Enterprises	Retail Trade	2	1971	Kenosha County	(C) Secured Creditor
82-00336	Carpet Faire, Inc.	Retail Trade	1	1969	Milwaukee Area	(C) Unsec. Creditor
82-00560	Essanee Enterprises, Inc.	Individual	1	N/A	Sheboygan County	(C) Secured Creditor
82-00630	Janicki's Men's Wear, Ltd.	Retail Trade	2	3-76	Milwaukee Area	(N)
82-00640	Koceja, W. & P.	Real Estate	NA	1978	Milwaukee Area	(C) Invol. Petition
82-00666	Upland Resources, Ltd.	Services		11-77	Walworth County	(C) Secured Creditor
82-01084	Lemanski, A. & J.	Agriculture	NA	2-79	Sheboygan County	(F) Secured Creditor
82-01119	Plunkett, O. & M.	Real Estate	NA	1970	Milwaukee Area	(C) State Sec. Comm.
82-01162	Goelzer & Schultz Co.	Construction	7	1895	Milwaukee Area	(C) IRS
82-01168	Rennhack, P. & S.	Agriculture	NA	3-77	Dodge County	(C) Secured Creditor
82-01396	Seidl, D. & N.	Services	NA	1975	Outagamie County	(C) Secured Creditor
82-01482	Horizons International, Inc.	Retail Trade	5	1-57	Milwaukee Area	(F) Secured Creditor
82-01516	Clausing, R. & J.	Agriculture	NA	1965	Washington Co.	(C) Secured Creditor
82-01542	New Frontier Manufacturing, Inc.	Manufacturing	8	9-78	Milwaukee Area	(C) Landlord
82-01784	Realty Plus	Real Estate	2	7-77	Racine County	(C) Secured Creditor
82-01836	Doelger & Kirsten, Inc.	Manufacturing	1	1888	Milwaukee Area	(N) Unsec. Creditor
82-01860	Foremost Metal Products, Inc.	Manufacturing	2	1972	Waukesha County	(F) Unsec. Creditor
82-01938	Powell, J. & R.	Real Estate	NA	1972	Racine County	(F) Secured Creditor
82-02183	Consolidated Aluminum Corp.	Manufacturing	7	1963	Milwaukee Area	(F) Unsec. Creditor

CHART I — TYPE OF FILINGS CONT'D

Case #	Name of Debtor	Type of Business	Number of Stockholders	Date Business Started	Place of Origin	Precipitator of Chapter 11 Filing*
82-02192	The Fire-Place, Ltd.	Retail Trade	7	10-71	Milwaukee Area	(C) Secured Creditor
82-02254	Dreske, K.	Individual	NA	NA	Milwaukee Area	(C) Secured Creditor
82-02305	Irish Enterprises Management Corp.	Services	1	1977	Milwaukee Area	(C) Secured Creditor
82-02610	K & S Oriental Food Store, Inc.	Retail	2	7-82	Milwaukee Area	(F) Secured Creditor
82-02673	Norwood Services, Inc.	Services	2	6-74	Milwaukee Area	(C) IRS
82-02694	Pavek Brothers Farms	Agriculture	2	1964	Langlade County	(C) Secured Creditor
82-02768	Kohler General Corp.	Manufacturing	2	4-57	Sheboygan County	(N)
82-03012	Rhode, R.	Retail	NA	8-72	Walworth County	(F) Secured Creditor
82-03058	K.J. & P.J. Investments, Inc.	Retail Trade	2	7-80	Racine County	(F) Secured Creditor
82-03128	Schoeffler Diamonds, Inc.	Retail Trade	1	5-80	Milwaukee Area	
82-03193	Staffaroni, M.	Individual	NA	NA	Milwaukee Area	(C) Secured Creditor
82-03455	National Control Systems, Inc.	Manufacturing	32	10-75	Milwaukee Area	(F) Combination
82-03509	Conservation Update Publications, Inc.	Manufacturing	2	7-80	Brown County	
82-03522	Zip Print, Inc.	Services	2	9-79	Milwaukee Area	(C) Equipment Leaseholders
82-03548	MacGillis & Gibbs Co.	Manufacturing	11	1898	Milwaukee Area	(C) Unsec. Creditor
82-03875	Leister, P.	Wholesale	1	1977	Milwaukee Area	(C) Involuntary
82-03907	Mattias & Son, Inc.	Services	1	6-81	Milwaukee Area	(F) Unsec. Creditor
82-03913	The Bernard Companies Insurance Agency, Inc.	Services	2	4-76	Door County	
82-03916	Ticali, D.	Services	NA	1963	Milwaukee Area	(N)
82-04341	Metanoia Corp.	Manufacturing	1	3-81	Fond du Lac Co.	(N)
82-04419	4X Corporation	Construction	23	1926	Winnebago County	(C) Secured Creditor
82-04439	Metal Parts Corp.	Manufacturing	3	1939	Fond du Lac Co.	(C) Secured Creditor
82-04443	Kool Brothers, Inc.	Manufacturing	7	1924	Winnebago County	(N)

* Key to abbreviations:
C = Creditor pressure directly controlled time of filing under Chapter 11.
F = Creditors brought pressure but debtor retained flexibility as to the time of filing.
N = Case was filed for reason not directly related to creditor threat of liquidation.

CHART II — SUCCESS BY SIZE, ETC.

Name	Months Bus. Survived After Filing	Assets	Shareholder Equity	Degree of Opposition	Consent*	Type of Business	Place of Orig. (County)
4X Corporation	Pending	33,100,423	11,980,023	Strong (13+)	—	Construction	Winnebago
Plunkett, O. & M.	***	11,346,690	(28,831,053)	Strong (10)	Yes	Real Estate	Milwaukee
MacGillis & Gibbs Co.	Success	7,498,501	(1,633,426)	Mild (2)	—	Manufacturing	Milwaukee
American Leisure Associates, Inc.	Success	4,175,872	(6,937,135)	Mild (1)	—	Real Estate Services	Milwaukee
Marina Enterprises	Success	4,046,963	3,566,857	Mild (1)	—	Retail Trade	Kenosha
A.W. Huss Co.	10	2,794,013	1,250,978	Strong (6)	No	Wholesale	Milwaukee
Kohler General Corp.	Success	2,385,820	(326,377)	None (0)	—	Manufacturing	Sheboygan
Kool Brothers, Inc.	9	1,591,805	957,422	None (0)	Yes	Manufacturing	Winnebago
Consolidated Aluminum Corp.	Success	1,459,884	(344,639)	None (0)	—	Manufacturing	Milwaukee
Koceja, W. & P.	20	1,181,000	(190,020)	Strong (3)	Yes	Real Estate	Milwaukee
Pavek Brothers Farms	Pending	1,141,000	(175,747)	Strong (4)	—	Agriculture	Langlade
Rennhack, P. & S.	9	1,105,270	(136,661)	Mild (1)	—	Agriculture	Dodge
Seidl, D. & N.	***	937,968	69,590	Mild (1)	Yes	Services	Outagamie
Clausing, R. & J.	12	863,325	226,532	Mild (1)	Yes	Agriculture	Washington
Upland Resources, Ltd.	***	848,100	185,947	Strong (1)	Yes	Services	Walworth
Metal Parts Corp.	13	758,933	(293,380)	Strong (3)	Yes	Manufacturing	Fond du Lac
Horizons International, Inc.	13	742,522	(111,351)	Strong (4)	Yes	Retail Trade	Milwaukee
Stanley J. Matson & Son, Inc.	16	585,608	184,466	Mild (1)	Yes	Construction	Racine
National Control Systems, Inc.	12	561,311	(2,878,851)	None (0)	Yes	Manufacturing	Milwaukee
The Fire-Place, Ltd.	Success	507,314	(2,602)	Mild (1)	—	Retail Trade	Milwaukee
Powell, J. & R.	Success	497,830	290,365	Strong (4)	—	Real Estate	Racine
Doelger & Kirsten, Inc.	1	457,693	115,288	None (0)	—	Manufacturing	Milwaukee
Irish Enterprises Management Corp.	1	396,956	(1,159,266)	None (0)	Yes	Services	Milwaukee
Lemanski, A. & J.	***	318,983	75,249	Mild (1)	Yes	Agriculture	Sheboygan
Realty Plus	5	281,100	(53,591)	Mild (1)	Yes	Real Estate	Racine

CHART II — SUCCESS BY SIZE, ETC. CONT'D

Name	Months Bus. Survived After Filing	Assets	Shareholder Equity	Degree of Opposition		Consent*	Type of Business	Place of Orig. (County)
Realty Construction, Inc.	***	249,810	27,803	Strong	(3)	Yes	Real Estate Construction	Milwaukee
Metanoia Corp.	Success	246,786	(467,476)	Mild	(1)	—	Manufacturing	Fond du Lac
Foremost Metal Products, Inc.	24	225,153	(368,064)	Mild	(1)	Yes	Manufacturing	Waukesha
Conservation Update Publications Inc.	8	206,633	(322,060)	Strong	(3)	Yes	Manufacturing	Brown
K.J. & P.J. Investments, Inc.	3	194,430	(184,091)	Mild	(2)	Yes	Retail Trade	Racine
Ticali, D.	A	177,635	(96)	Mild	(1)	—	Services	Milwaukee
Rhode, R.	7	177,556	(76,866)	None	(0)	Yes	Retail	Walworth
New Frontier Manufacturing, Inc.	9	156,662	(16,942)	Mild	(1)	Yes	Manufacturing	Milwaukee
Janicki's Men's Wear, Ltd.	9	120,236	(77,312)	None	(0)	Yes	Retail Trade	Milwaukee
Leister, P.	2	119,925	(181,593)	Mild	(1)	Yes	Wholesale	Milwaukee
Zip Print, Inc.	Success	112,895	(31,341)	Mild	(1)	—	Services	Milwaukee
Goelzer & Schultz Co.	11****	99,002	7,937	None	(0)	Yes	Construction	Milwaukee
Carpet Faire, Inc.	4	78,645	(167,874)	None	(0)	Yes	Retail Trade	Milwaukee
Dor-Phil, Inc.	5	74,659	41,146	Mild	(1)	Yes	Services	Milwaukee
Staffaroni, M.	NA	73,700	(254,144)	None	(0)	Yes	NA	Milwaukee
K & S Oriental Food Store, Inc.	6	73,700	(19,313)	Strong	(1)	No	Retail Trade	Milwaukee
Essanee Enterprises, Inc.	Success	70,000	21,182	None	(0)	—	Individual	Sheyboygan
The Bernard Companies Insurance Agency, Inc.	15	65,447	**(99,526)	None	(0)	Yes	Services	Door
Schoeffler Diamonds, Inc.	1	60,000	(162,729)	None	(0)	Yes	Retail Trade	Milwaukee
Mattias & Son, Inc.	27	41,420	(67,517)	Mild	(3)	Yes	Services	Milwaukee
North Side Heating & Sheet Metal, Inc.	Success	30,014	5,094	None	(0)	—	Construction	Racine
Norwood Services, Inc.	21	20,625	(18,174)	None	(0)	No	Services	Milwaukee
Dreske, K.	***	6,990	(57,796)	Strong	(1)	Unknown	Individual	Milwaukee

* Did the debtor consent to the closing of the business?

** This number does not include the lawsuit pending for $1,452,000.

*** Business was not operating at time of filing.

**** Business was not operating at time of filing but opened after filing and then closed.

A Case converted to a Chapter 7 ten months after filing. Business continued to operate under Chapter 7. Business was still operating at the time of this study.

CHART III — TIME ELAPSED

Name	Days Until Plan Proposed	Months Until Plan Proposed	Months Until Plan Confirmed	Months Until Case Converted/ Dismissed
A.W. Huss Co.				A
Stanley J. Matson & Son, Inc.				16
North Side Heating & Sheet Metal, Inc.	525	17	19	
American Leisure Associates Inc.	165	5	19	
Realty Construction, Inc.				24
Dor-Phil, Inc.	50	2	6	B
Marina Enterprises				14
Carpet Faire, Inc.				17
Essanee Enterprises, Inc.				7
Janicki's Men's Wear, Ltd.				5
Koceja, W. & P.				8
Upland Resources, Ltd.				12
Lemanski, A. & J.				7
Plunkett, O. & M.				A
Goelzer & Schultz Co.	115	4	11	12
Rennhack, P. & S.				9
Seidl, D. & N.	115	4		B
Horizons International, Inc.	229	7		13
Clausing, R. & J.				11
New Frontier Manufacturing, Inc.				9
Realty Plus				7
Doelger & Kirsten, Inc.				28
Foremost Metal Products, Inc.	288	9	12	24
Powell, J. & R.	108	4		C
Consolidated Aluminum Corp.	349	11	13	

CHART III — TIME ELAPSED CONT'D

Name	Days Until Plan Proposed	Months Until Plan Proposed	Months Until Plan Confirmed	Months Until Case Converted/ Dismissed
The Fire-Place, Ltd.	222	7	11	
Dreske, K.	147	5		14
Irish Enterprises Management Corp.				1
K & S Oriental Food Store, Inc.				9
Norwood Services, Inc.	97	3		21
Pavek Brothers Farms				D
Kohler General Corp.	183	6	9	
Rhode, R.				8
K.J. & P.J. Investments, Inc.				9
Schoeffler Diamonds, Inc.	269	9	14	
Staffaroni, M.				4
National Control Systems, Inc.				24
Conservation Update Publications, Inc.	132	4		6
Zip Print, Inc.	122	4	14	
MacGillis & Gibbs Co.				D
Leister, P.				3
Mattias & Son, Inc.	135	4	9	
The Bernard Companies Insurance Agency, Inc.	106	3		15
Ticali, D.				10*
Metanoia Corp.	208	7	10	
4X Corporation	294	11		E
Metal Parts Corp.				13
Kool Brothers, Inc.				11
AVERAGE	193	6	12	12

A The debtor has virtually completed liquidation without proposing a plan. The case will eventually be converted or dismissed.
B The debtor has completed liquidation under the plan. The case will eventually be dismissed.
C As of the date of this study the business was operating and a plan had been proposed, but the confirmation hearing had not been held.
D As of the date of this study the business was operating and no plan had been proposed.
E As of the date of this study the business was operating and no plan had been confirmed.
* Debtor continued to operate the business under chapter 7.

CHART IV — EMPLOYMENT OF PROFESSIONALS

Debtor's Name	Was Creditors' Committee Appointed?	Did Committee Retain an Attorney?	Was Chapter 11 Trustee Appointed?	Did Trustee Retain Attorney?	Was Examiner Appointed?	Accountant Employed by Whom?
A.W. Huss Co.	Yes	Yes	Yes	Yes	Yes	Trustee
Stanley J. Matson & Son, Inc.	Yes	Yes	No	—	No	—
North Side Heating & Sheet Metal, Inc.	Yes	Yes	No	—	No	—
American Leisure Associates, Inc.	No	No	No	—	No	—
Realty Construction, Inc.	Yes	No	No	—	No	—
Dor-Phil, Inc.	No	No	No	—	No	—
Marina Enterprises	No	No	No	—	No	—
Carpet Faire, Inc.	No	No	No	—	No	—
Essanee Enterprises, Inc.	No	No	No	—	No	—
Janicki's Men's Wear Ltd.	No	No	No	—	No	—
Koceja, W. & P.	Yes	No	No	—	No	—
Upland Resources, Ltd.	No	No	No	—	No	—
Lemanski, A. & J.	No	No	No	—	No	—
Plunkett, O. & M.	Yes	Yes	Yes	Yes	No	Trustee
Goelzer & Schultz Co.	Yes	No	No	—	No	—
Rennhack, P. & S.	Yes	No	No	—	No	—
Seidl, D. & N.	Yes*	No	No	—	No	Debtor
Horizons International, Inc.	Yes	Yes	No	—	No	Debtor
Clausing, R. & J.	No	No	No	—	No	—
New Frontier Manufacturing, Inc.	Yes	No	No	—	No	—
Realty Plus	Yes	No	No	—	No	—
Doelger & Kirsten, Inc.	Yes	Yes	No	—	No	**
Foremost Metal Products, Inc.	Yes	No	No	—	No	**
Powell, J. & R.	No	No	No	—	No	—
Consolidated Aluminum Corp.	Yes	Yes	No	—	No	Debtor

CHART IV — EMPLOYMENT OF PROFESSIONALS CONT'D

Debtor's Name	Was Creditors' Committee Appointed?	Did Committee Retain an Attorney?	Was Chapter 11 Trustee Appointed?	Did Trustee Retain Attorney?	Was Examiner Appointed?	Accountant Employed by Whom?
The Fire-Place, Ltd.	Yes	No	No	—	No	Debtor
Dreske, K.	No	No	No	—	No	—
Irish Enterprises Management Corp.	Yes	No	No	—	No	—
K & S Oriental Food Store, Inc.	No	No	No	—	No	—
Norwood Services, Inc.	No	No	No	—	No	—
Pavek Brothers Farms	Yes	Yes	Yes	No	No	—
Kohler General Corp.	Yes	Yes	No	—	No	—
Rhode, R.	No	No	No	—	No	—
K.J. & P.J. Investments, Inc.	Yes	No	No	—	No	—
Schoeffler Diamonds, Inc.	Yes	Yes	No	—	No	—
Staffaroni, M.	No	No	No	—	No	—
National Control Systems, Inc.	Yes	No	No	—	No	—
Conservation Update Publications, Inc.	Yes	Yes	Yes	—	No	—
Zip Print, Inc.	Yes	Yes	No	—	No	Creditors' Committee***
MacGillis & Gibbs Co.	Yes	No	No	—	No	Debtor
Leister, P.	No	No	No	—	No	—
Mattias & Son, Inc.	Yes	No	No	—	No	—
The Bernard Companies Ins. Agency, Inc.	Yes	No	No	—	No	—
Ticali, D.	No	No	No	—	No	—
Metanoia Corp.	Yes	No	No	—	No	Debtor
4X Corporation	Yes	Yes	Yes	Yes	No	Debtor and Creditors' Com.
Metal Parts Corp.		No	No	—	No	Debtor
Kool Brothers, Inc.	No	No	No	—	No	—

* No formal creditors' committee was appointed, but the three largest creditors acted as a committee.

** Accountant was approved by the court and employed by the debtor, but the accountant was not employed primarily for the chapter 11 proceedings. Accountant had been employed prior to filing.

*** Member of creditors' committee was an accountant. One of the owners was an accountant and did inside accounting work.

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CHART V — DEBTOR PROPOSED PLANS

Name of Debtor	First Plan Type	Percent of Unsec. to be Repaid**	Was Interest Offered?	Pay Out Time	Second* Plan Type	Percent of Unsec. Debt to be Repaid	Was Interest Offered?	Pay Out Time
North Side Heating & Sheet Metal Inc.	Operate	100	No	21 mos.				
American Leisure Associates, Inc.	Operate	100	Yes	5 yrs.				
Dor-Phil, Inc.	Liquidate	a		Unknown				
Goelzer & Schultz Co.	Operate	80	No	30 mos.	Operate	40	No	48 mos.
Seidl, D. & N.	Liquidate	a		Unknown				
Horizons International, Inc.	Operate	100	No	6 yrs.				
Foremost Metal Products, Inc.	Operate	100	No	3 yrs.				
Powell, J. & R.	Liquidate	100			Operate	50	No	36 mos.
Consolidated Aluminum Corp.	Operate	17.5	No	29 mos.				
The Fire-Place, Ltd.	Operate	75	No	30 mos.				
Dreske, K.	Liquidate	a		Unknown				
Norwood Services, Inc.	Operate	b						
Kohler General Corp.	Operate	20	No	Cash	Operate	25	No	Cash
Schoeffler Diamonds, Inc.	Liquidate	a		Unknown				
Zip Print, Inc.	Operate	100	No	3 yrs.				
Mattias & Son, Inc.	Operate	80	No	2 yrs.				
The Bernard Companies Insurance Agency, Inc.	Operate	13.5	No	3 yrs.				
Metanoia Corp.	Operate	26	No	17 mos.				
4X Corporation	Operate	30	No	3 yrs.	Operate	42.5	No	36 mos.

* Second plan is listed if materially different from first.
** Amount of unsecured claims which will be paid in full on confirmation.
a Property will be liquidated and proceeds will be distributed but percentage is unknown.
b All unsecured claims were paid in the normal course of business.